



**REPUBLIC OF KENYA**

**High Court at Meru**

**Environmental & Land Case 32 of 2012**

**HARUN NTORURU NASON SUING AS THE ADMINISTRATOR OF  
THE ESTATE OF NAHASHON MUKIAMA DECEASED.....PLAINTIFF**

**VERSUS**

**M'MWENDA M'NABEA M'IKWINGA.....DEFENDANT**

**R U L I N G**

The applicant/plaintiff filed this action against the defendant/respondent seeking a declaration that the deceased is the owner of 0.90 acres duly demarcated in his name at Ntuui and now wrongfully comprised in land Parcel No.Njia cia Mwendwa/715 and also an order directing the District Lands Surveyor and Land Registrar Igembe South to survey, fix the boundaries and register the plaintiff's deceased father's 0.90 acres demarcated at Ntuui within Njia Cia Mwendwa Land Adjudication Section.

Contemporaneously with the filing this suit the applicant filed Notice of Motion pursuant to Order 40 Rule 1 and 2 of Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act and Section 68 (1) of the Land Registration Act (No.3 of 2012) seeking the following orders.

- 1. That this Honourable court be pleased to issue an order of temporary injunction restraining the defendant by himself or anybody else from causing the alteration of the survey map of land parcel No.NJIA CIA MWENDWA/715 pending the hearing and determination of this suit or until further orders of this court.***
- 2. That this Honourable Court be pleased to issue temporary injunction restraining the defendant by himself or anybody else from causing the alteration of the survey map of Land Parcel No.NJIA CIA MWENDWA/715 pending the hearing and determination of this suit or until further orders of this court.***
- 3. That this Honourable Court be pleased to issue an order of temporary injunction restraining the defendant by himself, his agent or servant from interfering with the plaintiff's occupation and user of the portion of the suit land measuring 0.90 acres which the plaintiff and his siblings have been and still are in occupation and user pending the hearing and determination of this suit or until further orders of this court.***
- 4. That 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 supported by annexed affidavits of the applicant dated 25<sup>th</sup> June, 2012 and 30<sup>th</sup> July, 2012. The application is opposed. The respondent swore a replying affidavit in opposition to the application dated

2<sup>nd</sup> July, 2012 and had further replying affidavits sworn by one Peter M'Rukiri and another by Gichunge Muchuuka.

When this matter came up for hearing the counsel for the applicant and the respondent relied on the affidavits of the parties and requested the court to consider the same in determining the applicant's application.

This court read the pleadings filed by the parties herein in support of their opposing position. The issue for determination is whether the applicant has laid sufficient grounds for granting orders of inhibition restraining the respondent from dealing with land parcel No.Njia Cia Mwendwa/715 and further whether the applicant has satisfied the conditions warranting granting of orders of temporary injunction to restrain the defendant by himself or anybody else from altering of the survey map of land parcel No.Njia Cia Mwendwa/715 or from interfering with plaintiff's occupation and user of the portion of the suit land measuring 0.90 acres pending determination of this suit.

In the instant application the facts are that the applicant is the legal representative of the estate of the late Nahashon Mukiyama. That during the process of land consolidation and demarcation, the deceased had three parcels of land at Ntuui, Ringuri and Githari consolidated and demarcated together at Ntuui all measuring 0.90 acres. That the applicant expected after the process of adjudication was finalized to have 0.90 acres registered in the name of the deceased his father. That after registration he discovered his father's land had not been registered in his father's name. he followed up the matter and discovered from Land's registry that his father's 0.90 acres had been wrongfully surveyed together with the respondent's pieces in the survey map of land Parcel No. Njia Cia Mwendwa/715. That the suit land according to the map comprises of 1.40 acres but according to the respondent the suit land measures 0.25 hectares(0.62 acres). That according to the applicant the visit of the land by both the District Land Registrar and the Surveyor Igembe District confirmed the ground measurements to be more than what was shown on the land register of the suit land. That since demarcation of the land the applicant and his other family members have been in actual possession and user of 0.90 acres owned by their deceased father.

The respondent according to the applicant is threatening to either dispose of the suit land or evict the applicant.

The respondent has on his part disputed the facts given by the applicant claiming that he is the registered proprietor of the suit land which measures 1.25 acres and that he has lived on suit property all his life and that the applicant and his family members do not live on the suit land and have never lived there on. He further averred that the applicant live at a place called Naichu a distance of about 5km away. The respondent further averred infact it was his son one Peter M'Rukiri who is in effective occupation of the suit land and he has planted miraa, yams and bananas amongst other crops. That the miraa trees had been planted in 1985 and the same are now mature.

Peter M'Rukiri on the other hand in his affidavit has deponed that he lives and work upon the suit land and has done so the whole of his life. He averred that the applicant is not their neighbor and only laid their claim over the land in question in April, 2012. He avers that he has miraa on the suit land which he planted in 1985. Peter M'Rukiri stated that if there is any arithmetic and/or printing errors on government paper it does not in any way give the applicant any right over their family's land. Mr. Gichunge M'Uchuka in his affidavit averred that he summoned the applicant to hear his dispute but he declined to turn up. He averred the suit land belongs to the defendant which he claimed had been held by respondent's family for over 60 years before the adjudication process. He averred that at no time has the applicant or his family members ever lived on the disputed land.

In the instant application, the applicant deponed that his late father had three parcels of land at Ntuui, Ringuri and Githari which were consolidated and demarcated together at Ntuui measuring 0.90 acres. That when titles were issued he discovered that his father's land had been registered as part of the respondent's land, being Njia Cia Mwendwa/715. That according to map measurements the suit comprises of 1.40 acres whereas according to the Registration of the suit land measures 0.25 hectares.

That on a visit to the land it was confirmed that the grounds of the suit land was more than shown on the land register of the suit land. The respondent did not in his affidavit or that of his deponents contravert the assertions by the applicant. This therefore leads the court to conclude the portion on the ground is more than the portion due to the respondent as per his title deed. Peter M'Rukiri in his affidavit has not denied that the respondent's title has any error as he tried to justify the same by stating any arithmetic and printing errors on government paper does not in any way give the plaintiff any right over respondent's family land. The applicant is not claiming as this court understands the whole land is about 0.90 acres.

The applicant has deponed that the suit land is in danger of being alienated to a third party and/or that the respondent has threatened to take over the 0.90 acres that the applicant has been using. The respondent has not controverted that and this court believes that the respondent is threatening to dispose of the suit land. I therefore find that the applicant has satisfied the court that an order of inhibition ought to be issued to restrain the respondent from dealing with the portion measuring 0.90 acres out of Land Parcel No.Njia Cia Mwendwa/715 and also from causing the alteration of survey map of the suit land pending hearing and determination of the suit.

The test for granting an injunction have been settled in the case of **GIELLA –V-CASSMAN BROWN & CO. LTD (1973) E.A 358** in which Court of Appeal set out the principles to be considered as follows:-

1. ***An applicant must show a prima facie case with probability of success.***
2. ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.***
3. ***when the court is in doubt, it will decide the application on balance of convenience.***

In addition to the above it is now agreed that the court, in determining an injunction application it must bear in mind the oxygen principle. The oxygen principles are aimed at enabling the litigants to obtain justice affordably, expeditiously and appropriately.

Section 1A and 1B of the Civil Procedure Act provides:-

***“1A The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

***1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—***

- (a) the just determination of the proceedings;***
- (b) the efficient disposal of the business of the Court;***
- (c) the efficient use of the available judicial and administrative resources;***
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and***
- (e) the use of suitable technology.”***

In my considered opinion the overriding objective introduced by oxygen principle is most likely to supersede or enlarge or modify the tests laid down in the most referred to case of **GIELLA –VS- CASSMAN BROWN(SUPRA)**. The oxygen principle in a nutshell obliges the courts to do substantive justice and do away with injustices which may result in applying the tests for granting injunction strictly.

On the other hand it has to be noted the Constitution of Kenya,2010 has gone a long way towards minimizing the requirements alluded to granting injunctions by stipulating that justice is to be

administered without undue regard to procedural technicalities(See Article 159 (2) (d) of the Constitution of Kenya, 2010).

In the instant application the applicant has shown that his father's land had been consolidated and demarcated measuring 0.90 acres. That the portion of the respondent is bigger on the ground than the size shown in his title and that the applicant has been in occupation of part of the suit land. I therefore find that the applicant has established a prima facie case with probabilities of success.

That the applicant and his family members are still in occupation of part of the suit land being 0.90 acres which they call their home. They have developed the said portion. I find that by refusing to grant injunction the applicant will not only be deprived of their home and developments but would be evicted and they would suffer substantial loss and damages. The injury would not be adequately compensated by way of damages.

As earlier on stated this application cannot be fairly determined without applying oxygen principles which obliges court to do substantive justice. The court after weighing the whole evidence is of the view that substantive justice would be done by granting the application.

In view of the above the application dated 25<sup>th</sup> June, 2012 is granted and I proceed to make the following orders:-

1. ***An order of inhibition be and is hereby granted restraining all dealings with Land Parcel No.NJIA CIA MWENDWA/715 pending the hearing and determination of this suit or until further orders of this court.***
2. ***An order of temporary injunction be and is hereby granted restraining the defendant by himself or anybody else from causing the alteration of the survey map of land parcel No.Njia CIA MWENDWA/715 pending the hearing and determination of this suit or until further orders of this court.***
3. ***An order of temporary injunction be and is hereby granted restraining the defendant by himself, his agent or servant from interfering with the plaintiff's occupation and user of the portion of the suit land measuring 0.90 acres which the plaintiff and his siblings have been and still are in occupation and user pending the hearing and determination of this suit or until further orders of this court.***
4. ***Costs of this application to the applicant.***

**DATED, SIGNED, AND DELIVERED AT MERU THIS 16<sup>TH</sup> DAY OF OCTOBER, 2012.**

**J. A. MAKAU  
JUDGE**

**DELIVERED IN OPEN COURT IN PRESENCE OF:**

1. **Mr. H. Gitonga for applicant**
2. **Mr. Mbogo for the respondent**

**J. A. MAKAU  
JUDGE**