



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCCC NO. 59 OF 2005**

**PHYLIS KAMICIA.....PLAINTIFF**

**V e r s u s**

**M'RUGENTO MBOGORI.....DEFENDANT**

***LESIIT J.***

**R U L I N G**

The plaintiffs are the applicants in the Chamber Summons application dated 17<sup>th</sup> September 2010. They have brought the application under s. 3 and 3A of the CPA O.XXXIX r. 1, 2 and 2A of the CPR. They seek one order namely.

**That the honourable court do issue an order of injunction restraining the 1<sup>st</sup> defendant by himself, his servants and/or agents from excavating mining, removing stones, wasting or damaging the ground and soil on LR. No. ABOTHUGUCHI RUIGA/1012 pending hearing and determination of this suit.**

The appellant is premised on grounds on the face of the application namely

- (a) That the plaintiffs father MIRITI KIABURI (Deceased) was the original proprietor of L.R.No. ABOTHUGUCHI/RUIGA/1012.**
- (b) That the defendant is in unlawful occupation of the said land which is subject of this suit.**

- (c) **That the 1<sup>st</sup> defendant who is cousin to the plaintiffs is excavating stones from the suit land.**
- (d) **That the 1<sup>st</sup> defendant is purposefully and intentionally causing damage on the plaintiffs.**
- (e) **That it is only fair and just to preserve the suit property and protect the plaintiffs/applicants until this suit is heard and determined.**

The 2<sup>nd</sup> appellant has sworn a supporting affidavit of even date, sworn in support of the application. I have considered its contents. The application is application is opposed. The 1<sup>st</sup> defendant/respondent has filed replying affidavit dated 14<sup>th</sup> October 2010. I have considered its contents. The counsel for the plaintiff was Hon. Rtd

Mr. Rimita Judge. In his brief submissions before the counsel urged that the plaintiff, daughters of a deceased who denied the suit property wanted to have the suit property preserved pending the hearing and determination of the instant suit. Counsel urged that the 1<sup>st</sup> respondent was in the process of excavating stones from the land which would lead to damage.

Mr. Riungu represented the respondents counsel urged that the appellants do not own the land and therefore have no claim. Counsel urged that excavation complained of was not causing any damage to the land.

I have carefully considered submissions by both counsels. I have considered the application and various affidavit and annexure filed for and against the application.

The applicants are seeking injunctive relief. This is a discretion any order. The court has to consider the case guided by the principle Act out in the case of **Giella vs Cassman Brown & Co Ltd [1973 EA 358]**. First the appellant must make out a prima facie case with a probability of success at the trial; secondly an injunction will not normally issue if the injury feared may adequately be compensated in damages; and thirdly, if the court is in doubt, it should vacate the application on a balance of convenience.

I am un aware that at this stage I am not expected to decide the merits of the case with finality.

Looking at this matter from the above perspective the first question to ask is whether the plaintiff has made out a prima facie case with a probability of success. I have looked at the plaint filed by the plaintiff herein. The plaintiff's are seeking a declaratory order against the defendants that the defendants hold the suit property in trust for the plaintiffs. Their claim lies under the law of succession act that they were the daughters of the original owners of the suit property and that they were entitled in priority to the defendants to inherit the deceased estate.

I am satisfied that the plaintiffs have a reasonable case with a probability of success.

Even if this application were to be determined on the second principle land issues in Kenya are very sensitive in this particular matter the plaintiff are claiming a declaration of trust of the suit land for reasons that they were entitled to inherit the land. I do not think that the plaintiffs can be adequately compensated by an award of damages if they were to succeed in this matter day and the injunction had not been granted.

Even if the court were to apply the principle of balance of convenience it is my view that the convenience would tilt in favour of the plaintiff to preserve the suit property in the state in which it is currently. I would still find in favour of the plaintiffs.

Having come to the conclusion I will allow the plaintiffs application and order as follows:

- 1. An order of injunction be and is hereby issued restraining the 1<sup>st</sup> defendant by himself, his servants and/or agents from excavating mining, removing stones, wasting or damaging the ground and soil on LR. No. ABOTHUGUCHI/RUIGA/1012 pending hearing and determination of this suit.**
- 2. The plaintiffs will have the costs of this application.**

Dated Signed and delivered at Meru this 17<sup>TH</sup> day of February 2011.

**LESIIT, J**

**JUDGE**