



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 2 OF 2011

**IN THE MATTER OF ALLEGED THREATENED CONTRAVENTION OF
FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA**

FLORENCE NKIO

PHILIPPETITIONER

VERSUS

**TIGANIA EAST & WEST DISTRICTS LAND ADJUDICATION OFFICER1ST
RESPONDENT**

**HON. ATTORNEY GENERAL2ND
RESPONDENT**

**STEPHEN NCHEBERE.....3RD
RESPONDENT**

**GERVASIO MUGAMBI THITURA.....4TH
RESPONDENT**

**KIMATHI MUGAMBI5TH
RESPONDENT**

RULING

The petitioner Florence Nkio Philip has filed a petition seeking declaration that the 1st respondent intention to cancel her name and replace it with the 3rd respondent's name in the register of Antuamburi Adjudication Section of parcel number 4295 (suit property) was illegal. She further prays for a permanent

injunction to restrain the 3rd, 4th and 5th respondents from claiming the suit property or entering or interfering with her quiet possession. The petitioner filed an interlocutory application for injunction by way of Chamber Summons dated 14th January 2011. By that application, the petitioner seeks an injunction against the 3rd, 4th and 5th respondents seeking to restrain them from entering, fencing or whatsoever interfering with the petitioner's quiet possession of the suit property. In her affidavit the petitioner stated that she had been in exclusive continuous possession of the suit property. That the High Court through Meru Misc. Application No. 42 of 2009 had quashed the decision of the 1st respondent which had deprived her of the suit land in favour of the 4th respondent. The petitioner deponed further that the 3rd respondent who had not been in possession of the suit property had gone on the suit property in the company of his wife and 5 young men and threatened to cut her with a simis if she stops them from digging holes for fencing. In their digging, the petitioner alleged that they vowed to forcibly drive her out of the suit property. That in the course of their forcible entry they damaged her fence. She further stated that the 1st respondent had threatened to cancel her name from the register of the suit property and to record it in the 4th respondent's name. The petitioner deponed that the 4th respondent's wife in the company of young men had threatened to destroy her maize crop and she feared that they would actualize their threats. The 4th respondent in the replying affidavit stated that he first became the registered owner of the suit property in 1969. This registration was after he successfully conducted a case before a committee where the committee found that the petitioner's father had sold the property to him. That the petitioner in his absence in 1992 went to the land adjudication officer and in the proceedings which the 4th respondent did not participate before that adjudication officer it was ruled that the objection which had been heard in 1961 be re-heard a fresh. 4th respondent filed an objection number 17 of 2008 to that ruling of 1992 and the decision of the land adjudication officer was to the effect that the matter would not be re-heard. In High Court Misc. Application No. 58 of 2009 the High Court quashed the ruling of the objection number 17 of 2008 and ordered that the matter be heard a fresh because of procedural irregularities. The petitioner did not abide by the High Court ruling in Misc. Application No. 58 of 2009. Instead the petitioner filed this petition. The 3rd respondent deponed in his affidavit that the petitioner variously caused him to be charged in the criminal court where he was charged with cutting down trees. In those cases, the courts always found that the trees were on his land. The principle of granting an injunction were stated in the case **Geilla Vs. Cassman Brown & Co. Ltd** [1973] E.A where the principles of granting an injunction were set out as follows:-

1. ***An applicant must show a prima facie case with a 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 the balance of convenience.”***

The petitioner and the 4th respondent both alleged to be in possession of the suit property. They both also alleged to be the registered owners of the suit property. The petitioner in my view has not shown a *prima facie* case with a probability of success. This is because there is the possibility that the 4th respondent is the one in possession and has been so. To grant an injunction as sought may detrimentary affect his possession of that land. But I find the greatest reason why the petitioner does not deserve the court to exercise its discretion in her favour is I believe she is playing “*Russian roulette*” so to speak with the court actions. She attempts one process in the hope it will yield her desired result and when it does not she files another action. The petitioner when she filed the judicial review matter High Court Misc. Application No. 58 of 2009 the court quashed the decision of the adjudication officer then ordered the objection to be re-heard. Instead of going for the re-hearing of the objection, the petitioner filed this petition. It should be recalled that an injunction is a discretionary remedy and for the court to exercise that discretion it would require a party not only to be candid when approaching the court but also not to seem to ignore the orders of the court. The petitioner in failing to pursue the re-hearing of the objection as ordered by the court in the judicial review matter does not endear herself to the exercise of that

discretionary remedy in her favour. It is for those reasons that I hereby dismiss the Chamber Summons dated 14th January 2011. The injunction orders granted by this court on 17th January 2011 are hereby vacated and discharged. The petitioner shall pay costs of that Chamber Summons dated 14th January 2011 to the 3rd, 4th and 5th respondents.

Dated, signed and delivered at Meru this 31st day of March 2011.

MARY KASANGO
JUDGE