CIVIL PRACTICE AND PROCEDURE

· **Principles of granting an injunction.**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 147 OF 2010

ZIPPORAH KABERE M'MBOGORI

***(Suing as the Administratrix of the estate of the late M'Mboroki M'Araja)*...........1ST PLAINTIFF**

JOSEPH MWIRIGI MBOROKI ....2ND PLAINTIFF

VERSUS

HARUN MUKARIA...DEFENDANT

RULING

The two plaintiffs have filed this action against the defendant seeking an order of eviction of the defendant from L.R. No. *Nthimbiri/Igoki/50* (suit property). They seek an order of injunction to restrain the defendant, his servants or agents from entering or interfering with the plaintiff's quiet possession of the suit property by a Chamber Summons dated 18th November 2010. The plaintiff by that summons seeks interlocutory injunctive orders pending the hearing and the determination of this suit. In the affidavit in support, the 1st plaintiff stated that the suit property belonged to her deceased husband. She referred to a confirmed grant which divided the suit property amongst the deceased beneficiaries. She deponed that when the grant was confirmed, the court made a finding that the defendant was not a son of the deceased and was therefore not entitled to occupy the suit property. It was further deponed by the plaintiff that the defendant on 14th November 2010 forcibly entered the suit property and placed thereon semi permanent houses. Those houses she deponed were placed on the land occupied by the 2nd plaintiff. The 2nd plaintiff in his affidavit in support of the application stated that in 1990 he planted tea leaves, yams, arrow roots and trees on the suit property. He also established his home on two acres. He too

deponed that the defendant on 14th November 2010 went on the suit property and trespassed on his land and placed thereon two semi permanent houses and begun to live there. He stated that in his affidavit that the defendant had threatened to kill him and to destroy his development so that the defendant can plant coffee and khat (miraa). The 2nd plaintiff stated that his tea was ready for picking at the time when he swore the affidavit and that he would suffer loss if the defendant continued to deny him access to the same. The defendant filed a replying affidavit which was supported by an affidavit by his mother Naomi M'Mboroki. The defendant deponed in his affidavit that the plaintiff's affidavit were full of falsehoods. This is because he said that he had lived with his mother on the suit property all his life. He said that he presently was living with his mother on the one acre of land she was given in the succession cause. The defendant alleged that the plaintiff's interest was to have him thrown out of the suit property. His mother Naomi confirmed his deposition. She deponed that the suit land had been surveyed according to the confirmed grant in the succession cause. That the survey work had involved various beneficiaries who were inheriting the land moving to the area allocated to them. She said that she had accommodated the defendant on the one acre land. The plaintiffs filed supplementary affidavit denying the averments of the defendant and his mother. I have had the opportunity to look at the judgment in High Court Meru Succession Cause No. 289 of 2007 dated 3rd July 2009. That was the judgment which confirmed the grant. The deceased in that succession cause had two wives. One in the first house is the first plaintiff. The other in the second house is Naomi M'Mboroki. The first house has six children. The second house has four children one of whom is second plaintiff namely Joseph Mwirigi. The court made a finding in that judgment that the defendant Harun Mukari was born 8 years after the death of the deceased and was therefore not the son of the deceased. The court found that Harun was not entitled to share in the estate of the deceased which included the suit property. By that judgment, the court gave both wives in the two houses one acre each on the suit land for their lifetime. It is clear from that judgment that the court failed to make a determination of the remainder men in respect of those two acres held by the two wives for their lifetime. The sons of the first house and the second house were awarded 2.5 acres each on the suit property. I could not find a finding by the court that the defendant was not entitled to occupy the suit property. The court's determination of that judgment was limited to making a finding on which of the beneficiaries were entitled to inherit the deceased property. Despite that judgment having been delivered in July 2009, the administrator, the first plaintiff, has not moved to have the suit property sub divided in accordance with that judgment. The issue for consideration in respect of the Chamber Summons dated 18th November 2010 is whether an order of interlocutory injunction can be awarded against the defendant with that background in mind. The defendant before court stated that he is presently occupying his mother's (Naomi) portion which she holds for her lifetime. The crux of the interlocutory injunction application by the plaintiffs is best captured by the affidavit sworn on 2nd February 2011 of the 2nd plaintiff paragraph 17 which I reproduce here.

"That the respondent (defendant) should not be allowed to occupy even the one acre where in my said mother (Naomi) has a life interest because he shall later legitimize his occupation and claim title thereto through for example, adverse possession."

The principles of granting an injunction were set out in the case **<u>Giella vs. Cassman Brown & Co. Ltd</u>** (1973) EA which are:-

(i) an applicant must show a prima facie case with a probability of success;

(ii) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;

(iii) when the court is in doubt, it will decide the application on the balance of convenience.

The plaintiff by their application seek to restrain the defendant from entering or staying on the suit

property. The suit property was awarded to various people in the judgment referred to above amongst whom is the defendant’s mother Naomi. She has welcome the defendant on her portion of land and in my considered view the plaintiffs would have no say on who Naomi invites on her land. The life interest that she obtained on the suit property gives her that right. The plaintiffs cannot also dictate which of Naomi’s children can live with her on her portion. The award made in the succession cause giving Naomi one acre of the suit property for her lifetime, gave her the right of enjoyment of that land for her lifetime which enjoyment would include invitation on that land of whoever she wishes to live with her. It is for that reason that I find that the plaintiffs have not shown a *prima facie* case with a probability of success. The plaintiffs have also not shown what loss or damage they will suffer if the defendant occupies his mother’s portion. Having made those two findings, I find that the third principle of granting an injunction is not applicable because I entertain no doubt. The essence of the prayers that the plaintiffs sought was to separate the defendant from his mother. The court declines to countenance that prayer. It is for that reason that the Chamber Summons dated 18th November 2010 is dismissed with costs being awarded to the defendant. The injunctive order issued in this case against Harun Mukaria on 23rd November 2010 is hereby vacated.

Dated, signed and delivered at Meru this 17th day of March 2011.

MARY KASANGO
JUDGE