



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 126 OF 2009

FRANCIS MURITHI RUTERE (Suing as the administrator of the estate of M'RUTERE
M'MUNYANGE alias RUTERE MUNYUNGI(DECEASED)).....PLAINTIFF/APPLICANT

VERSUS

JULIUS MUTWIRI NJUKI 1ST DEFENDANT/RESPONDENT
PHINEAS MUTWIRI 2ND DEFENDANT/RESPONDENT

RULING

The applicant by an application dated 22nd September, 2009 under by then Section 3A and 63(c) and (e) of the Civil Procedure Act and Order XXXIX Rule 1, 2, 2A, 3(1) and 9 of Civil Procedure Rules, now order 40 Rule 1 of Civil Procedure Rules seeks the following Orders:-

“ That pending inter-partes hearing and determination of the suit or until further orders of the court, this honourable court be pleased to issue an interlocutory injunction restraining the defendant/respondents whether by themselves or their agents, servants, employees, assigns or whomsoever claiming or acting for, on behalf of or through them or either of them from entering into, trespassing into, cultivating, digging a foundation, or howsoever interfering with L. R. No. ABOTHUGUCHI/KARIENE/1189 measuring about 2.31 acres”.

The applicant is an administrator of the estate of the registered proprietor of the suit premises by virtue of having been issued with limited grant annexure “FMRI”. The suit premises is registered in the name of Rutere Munyugi(deceased) as per attached Abstract of title marked “FMR2”

The respondents are father and son and said to be relatives of the applicant. The suit property is an agricultural land which was registered for the first time in the name of father to the applicant the late Rutere Munyugi on 15th December, 1966. The proprietor is said to have passed on 6th July, 2007. That during the life time of the proprietor it is said the respondents never claimed interest over the suit premises. The applicant’s counsel relied on supportive affidavit dated 22nd September, 2009, and supplementary affidavit dated 16th November, 2009.

The respondents strongly opposed the applicant’s application. The respondents are relying on Replying Affidavit dated 9th November, 2009 and further affidavit dated 9th December, 2009.

I have had the opportunity of going through the affidavits in support and in opposition and hearing both counsel in their sub-divisions for and against the application.

The applicant's affidavit to the effect that the suit premises was registered in the name of Rutere Munyugi has not been controverted. That the respondents in their HCSC No.471 of 2007 had Abothuguchi/Kariene/1189 excluded from the assets of the estate of Njuki Munyugi following objection by the applicant as the property belonged to the father of the applicant. In his affidavit and in his counsel's submission it was stated that the respondents on 15th August, 2009 unlawfully entered into the suit premises and started committing acts waste. The respondents are alleged to have forcefully restrained the applicant and his brother from entering into the suit land. That the said premises is part of estate of Rutere Munyugi estate in HCSC 367 of 2009 to which no objection has been filed by the respondents.

The respondents claim the suit premises through "adverse possession" in their defence in which there is no counterclaim. Respondents claim to have been in possession of the land for 30 years. I have perused all the pleadings, affidavits and annexures and regret I do not believe the respondents. If that was the position they would have put a counterclaim and pointed out that was their land through adverse possession when they were first faced with objection by applicant in HCSC 471/2007.

In an application for injunction of an interlocutory nature the onus is on the applicant to satisfy the court that it should grant the injunction. An injunction being a discretionary remedy it is granted on the basis of evidence and sound legal principles.

The test for granting an interlocutory injunction are well settled. The principles are stated in **Giella VS – Cassman Brown & Co. Ltd(1973) E.A 358** which are stated as follows:-

- (1) ***The applicant must establish a prima facie case with a probability of success***
- (2) ***The applicant has to show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages.***
- (3) ***That if court is in doubt should decide the application on balance of convenience.***

The jurisdiction of the court to grant injunction under Order 40 Rule 1 is specific. It can only be exercised when it is shown that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit and wrongfully sold in execution of a decree.

The evidence before me shows the property in dispute is in danger of being wasted, damaged or alienated by the respondents. The applicant has further adduced evidence as an administrator of the deceased estate and through an order issued in HC.SC 471/2007 and through succession HCSC No.367/2009 to show that he has an interest over disputed land. That no claim has been made over disputed land by the respondents through counterclaim on account of fraud and no objection was made to confirmation of grant in favour of the applicant.

I am therefore convinced that applicant has established a prima facie case with probability of success. The applicant has shown that he will suffer irreparable harm which cannot be adequately compensated by an award of damages.

The applicant if injunction is not granted would stand to loss land which he is said to have attached a lot of sentimental value and interest; which cannot be compensated by way of damages.

In view of the foregoing, this application must succeed. The respondents are by themselves, their agents, servants, employees, assigns or whosoever claiming or acting for, on behalf of or through them restrained from entering into, trespassing into, cultivating, digging a foundation and or interfering with L.R Abothuguchi/Kariene/1189 till suit is heard and determined.

The applicant gets costs of this application.

Right of Appeal.

DATED AND DELIVERED AT MERU THIS 17th day of November, 2011

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

- 1. Mr. Mwirigi hb for Mr. Mbaabu for plaintiff/applicant***
- 2. Nelima for the respondent***

J. A. MAKAU
JUDGE