



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**Civil Case 140 of 2009**

**MUREMERA IREA ..... PLAINTIFF**

**VERSUS**

**EDWARD MURIUKI ..... 1<sup>ST</sup> DEFENDANT  
JUDITH MWARUMWE ..... 2<sup>ND</sup> DEFENDANT  
FLORENCE MWARI ..... 3<sup>RD</sup> DEFENDANT  
GLADYS MUKUBA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff in this case although he did not disclose in his pleadings is the father of all the defendants. When he filed the plaint in this case, he simultaneously filed the chamber Summons dated 16<sup>th</sup> October 2009. By that application, he seeks injunction to restrain the defendants from entering parcels number *Ntima/Igoki/1745* and *Kiirua/Ruiri/280*. The prayers in the plaint are for permanent injunction which prayer is similar to the interim orders sought in the Chamber Summons. It is therefore clear that to grant the interim injunction which is sought by the plaintiff would essentially be granting the orders that are in the plaint. It is not desirable except in very exceptional circumstances for interim orders to be granted which are similar to the orders sought in the main suit. The plaintiff in his affidavit in support of his application stated that the defendants had threatened to cultivate on his parcels of land. He said that he had reported the matter to the police but he failed to give details of the O.B. number given of the report. The defendant in opposition to the application stated that they are children of the plaintiff and that this action was filed at the instigation of one of their brothers David Kiugu. They deponed that David presently cultivates 10 acres out of the 18 acres of parcel number 280. They further stated that the intention of David is that he be left alone cultivating that land. Those depositions were not contraverted by the plaintiff. The Court also entertained an application filed by the defendants by way of Notice of Motion dated 4<sup>th</sup> February 2010 which was brought under Section 6 of the Civil Procedure Act. They sought that this suit be stayed on the basis that there is a pending matter before this court relating to the same subject matter. They deponed that they previously sued the plaintiff before the Land Dispute Tribunal in Case No. 23 of 2007 which was dismissed. They filed an appeal against that dismissal before the appeals Committee. Similarly, the Appeals Committee dismissed their appeal. They have now filed before this court an appeal against the dismissal by the Appeals Committee. That appeal is still pending before this court. Although they did not state what their claim was before the Land Dispute Tribunal, it is deponed that what prompted them to sue their father before the Tribunal was that their father had at that time tried to restrict their use of the suit property. The appeal they filed before this court is Civil Appeal No. 1100 of 2007. it is a concern to me that even though there is that pending appeal before this court, the plaintiff stated in his plaint that there is no other pending

suit between him and the defendants. This is what he stated in his plaint:-

**“The plaintiff avers that there is no suit pending between the plaintiff and the defendants over the subject matter of this suit.”**

It should be noted that the plaint was verified as incorrect by the plaintiff in his verifying affidavit. With the disclosure being made by the defendants that there is a pending appeal between the plaintiff and the defendants, it is obvious that the plaintiff has not been candid to the court. It is essential when a party comes before court seeking injunctive orders that they make full disclosure to the court. I find that the plaintiff’s Chamber Summons has no merit because of what is stated by the defendants and which the plaintiff did not controvert. It is clear that the defendants are cultivating at least one of the suit properties. They are after all, children of the plaintiff. They possibly have by virtue of what they deponed an overriding interest over the suit properties as recognized by Section 30(g) of the Registered Land Act. That Section provides:-

**“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same, without their being noted on the register:- (a)**  
.....

**(b)** .....

**(c)**.....

**(d)** .....

**(e)** .....

**(f)**.....

**(g) The right of a person in possession or actual occupation of land to which he is entitled in right only such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”**

It is also possible that the defendants have a right to claim that there exist a family trust over the suit properties. For the above reasons, the Chamber Summons dated 16<sup>th</sup> October 2009 is dismissed with no orders as to costs. The defendant’s Notice of Motion dated 4<sup>th</sup> February 2010 is in my view merited. The issue raised at the tribunal hearings was whether or not the defendants had the right to use the suit properties. The matter is still pending before this court as an appeal. To allow this case to proceed for hearing and running parallel to the pending appeal is to entertain the danger that two courts may very well give divergent decision on the same subject matter. Section 6 of the Civil Procedure Act provides as follows:-

**“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”**

In my view, the Notice of Motion filed by the defendants is merited and the ruling of this court is as follows:-

- 1. The plaintiff’s Chamber Summons dated 16<sup>th</sup> October 2009 is dismissed and the costs thereof shall be in the cause.**
- 2. The defendant’s Notice of Motion dated 4<sup>th</sup> February 2010 is allowed as prayed in prayer number 1. The costs shall be in the cause.**

Dated and delivered at Meru this 7<sup>th</sup> day of May 2010.

**MARY KASANGO**  
**JUDGE**