

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 101 of 2009

CALEB OKOTH OUKO (suing as the personal and legal Representative to the

Estate of ASENATH AUMA AKUNO (Deceased).....PLAINTIFF/APPLICANT

AND

TOM OTIENO APOLADEFENDANT/RESPONDENT

RULING

Parcel No. Central Kasipul/Kamuma/1721 measuring about 0.07 Hectares belongs to the deceased Asenath Auma Akuno. The Plaintiff/Applicant is the grantee of Letters of Administration ad litem in regard to the Estate left behind. He states that since about March 2009 the Defendant/Respondent has without any colour of right or consent trespassed upon the land, taken possession, fenced it and has commenced construction. He has filed this case for eviction and permanent injunction. In the meantime, he seeks an order of temporary injunction restraining the Respondent by himself, his servants/agents or any other person(s) claiming through him from repossessing, occupying or dealing howsoever with the land.

The application was served. The Respondent appointed **Eric Ntabo & Co. advocates** to act for him. On the appointed day of hearing neither Respondent nor his Advocate attended. No papers were filed in response.

In presenting the application, **Mr. Ochillo** relied on **Giella v. Cassman Brown & Co. Ltd [1973] EA 358** to say the principles for the grant of temporary injunction had been established by the Applicant.

It is clear that the property in question is being wasted and damaged, but can prohibitory injunction be granted? The Respondent is not threatening to enter the land which would be a basis for the sought injunction. I understand the Applicant to be seeking an order to remove the Respondent from the parcel of land and to be so removed until the suit is heard and determined. **Order 39 rule 1** of the **Civil Procedure Rules** cannot be invoked for injunction where there is no allegation that any property in dispute in the suit is in danger of being wasted, damaged or alienated or wrongfully to be sold (**Agip (K) Ltd v. Maheshchandra Vora & Others [2000] 2 EA 285**). It is only a mandatory injunction that would have been appropriate to remove the Respondent from the land and to destroy the house he has already erected thereon (**East African Fine Spinners Ltd and Others v. Bedi Investment Ltd Civil Application No.72 of 1994 at NBI**). The Applicant did not seek a mandatory injunction. The application is consequently dismissed with costs.

Dated, signed and delivered at Kisii this 29th day of **June, 2009**

A. O. MUCHELULE

JUDGE

29th June, 2009

Before A. O. Muchelule Judge

Mr. Ochillo for Applicant

Parties present.

Court: Ruling in open court.

A. O. MUCHELULE

JUDGE