



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

**Civil Case 61 of 2008**

**LINUS RIUNGU M'AKANGA ..... PLAINTIFF**

**VERSUS**

**ERASTUS NJAGI KAMUNDI ..... DEFENDANT**

**RULING**

The applicant filed this chamber summons dated 4<sup>th</sup> February 2009 simultaneously with the plaint herein in which plaint he seeks that the court orders the removal of the caution placed against his parcel of land No. MWIMBI/N. MUGUMANGO/1318 (the suit) by the respondent.

The second relief sought is permanent injunction to restrain the respondent from trespassing, entering and/or cultivating the suit land. In the chamber summons, the applicant seeks a temporary order of injunction to restrain the respondent or his agents from trespassing, entering and or in any way interfering with the suit land pending the hearing and determination of this suit. The application further seeks supervision of the implementation of the first order by the OCS Ntumu Police Station.

It is the applicant's case that he is the registered proprietor of the suit land pursuant to a grant in Meru High Court (ought to be Chuka SRM (court) Succ. Cause No. 48 of 2001.

That the respondent has been making attempts and occasionally has trespassed on the suit property and harvested maize crops grown on the suit land by the applicant. The respondent on the other hand has averred that on 22<sup>nd</sup> April 2002 he purchased two acres of the suit land from the applicant's father, M'Kanga M'Rangata at a consideration of Kshs. 140,000/=. That the said M'Kanga M'Rangata was a beneficiary of the suit property which was owned by the late Ruciami Rangata and was earmarked to be beneficiary of 4 acres of the suit land. That unfortunately the said M'Kanga M'Rangata died.

That before his death M'Kanga M'Rangata had shown the respondent the two acres in question and the respondent had started farming the same. That the respondent had paid Kshs. 55,000/= as part payment of the purchase price. That the applicant has fraudulently inserted his name in the certificate of confirmation of the grant which he has used to cause the suit land to be registered in his name.

That in brief are the respective positions of both sides. It is settled that for the applicant to obtain an order of temporary injunction he must demonstrate that he has a *prima facie* case with a probability of success. Secondly, it must be shown that the injury the applicant stands to suffer if the injunction is not granted is one that may not adequately be compensated by an award of damages. In case the court is in doubt the

application must be decided on a balance of convenience. Se Giella V. Cassman Brown (1973) EA 359.

In considering whether or not the applicant has a *prima facie* case, the court is not called upon to determine the rights of the parties at this stage. For that reason, the court ought to avoid making definite findings of either fact or law. The applicant's case is that he is the registered owner of the suit property. That he was registered as the owner of the suit property as a result of a succession cause.

The respondent's claim is that the applicant's father had sold the suit property to him and he had made part payment and occupied the suit property.

That the registration of the applicant as the proprietor of the suit property was illegal and fraudulent. The original owner of the suit property, the late Ruciami Rangata died and a succession Case No. 48 of 2001 filed at Chuka SRM's court. According to a copy of certificate of confirmation of a grant, the late Ruciami Rangata left 3 parcels of land including the suit land. From the suit land, one M'Kanga M'Rangata, the father of the applicant was to get 4.0 acres.

It is not indicated in the pleadings when the said M'Kanga M'Rangata died – but he died. According to a copy of certificate of confirmation annexed to the applicant's affidavit in support of this application, he (M'Kanga M'Rangata) was to get, as I have indicated 4.0 acres from the suit land. His name has, however, been struck out and the name of the applicant added at the end of the list. No explanation has been offered for this glaring anomaly. It is more curious when one considers the copy of the certificate annexed to the respondent's replying affidavit in which the late M'Kanga M'Rangata's name has not been cancelled and the applicant's name is missing altogether. That creates doubt as to the manner the suit land was transmitted.

The other curious thing about the sale of the suit land to the respondent is that it is apparent that the said sale took place before the grant was confirmed.

Section 55(1) of the Law of Succession Act provides that:-

*“55. (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.”*

The grant was confirmed on 17<sup>th</sup> September 2002, yet some five (5) months prior to the confirmation, on 22<sup>nd</sup> April 2002 the deceased, M'Kanga M'Rangata, was purporting to dispose of what he only expected to be his share of the estate.

In a nutshell, I am of the opinion that the applicant has not made out a *prima facie* case. At the same time, the respondent's claim is doubtful. The applicant has not demonstrated what kind of injury he stands to suffer if a temporary injunction is not granted. The suit land although registered in his name, I have observed that the transmission was doubtful.

If that be so, no injunctive orders can be issued. The matter must now be available to the police to deal with any breach or likely breach of the peace in respect of the suit land pending the hearing and determination of the dispute herein.

I make no orders as to costs.

Dated and delivered at Meru this 10<sup>th</sup> day of June 2009.

**W. OUKO**

**JUDGE**