



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Suit 112 of 2008

JOHANA KAMOYO

(Suing as the Legal Representative and Administrator of the estate of

DAUDI M'NCHEBERE M'ITANGURU) APPLICANT

VERSUS

M'NJIRU M'MUNGANIA 1ST RESPONDENT

MAROO M'MUNGANIA *(Sued as the Legal Representative and*

Administrator of the Estate of M'MUNGANIA M'MWETHIRU

ALIAS MUNGANIA MWATHERU) 2ND RESPONDENT

RULING

The respondents were duly served to with this application but have failed to reply hence the *ex parte* hearing. It is an application for orders of an injunction and inhibition. It is the applicant's case that parcel of land No.NJIA-CIA-MWENDWA/336 is registered in the name of his late father, Daudi M'Nchebere M'Itanguru now deceased, while NJIA-CIA-MWENDWA/1591 was registered in the name of the respondents' father, also deceased. It would appear that the two parcels of land are adjacent to each other, hence the applicant's claim that 1 acre of NJIA-CIA-MWENDWA/336 has been lived off and annexed to NJIA-CIA-MWENDWA/1591.

The applicant deposes that he lives on NO.336 with his siblings and have constructed seven (7) houses on the said No.336 apart from planting coffee trees, miraa and crops. That the respondents have forcibly tried to evict the applicant and are plucking his miraa by force. That they are surveying and putting beacons on the disputed one acre.

As observed at the beginning of this ruling the respondents have not replied to this application. Similarly they did not attend the court when the same came up for hearing. This notwithstanding the burden was still upon the applicant to demonstrate that he has a *prima facie* case with a probability of success. He must also show that if the order of injunction is not granted he stands to suffer substantial loss which cannot be compensated by an award of damages.

Finally it must be shown that the balance of convenience is in his favour. See Giella V Cassman Brown.

The court in determining whether or not the applicant's application discloses a *prima facie* case is not expected to determine with finality the rights of the parties. Rather it is concerned with seeing that the applicant has demonstrated the existence of some right which the respondent has violated as to call upon the latter to rebut. See Mrao Ltd V First Americal Bank (K) Ltd (2003) KLR 125.

It is the applicant's case that No.336 was registered in the name of his father while NO.1591 was registered in the name of the respondent's father. It is expressly stated by the applicant that both his father and the father of the respondents are deceased. Although the application is headed that the applicant is suing as the legal representative of his father and the 1st respondents sued as the legal representative of his father there is no evidence that indeed letters of administration in respect of the two have been issued to the applicant and the 1st respondent.

I am compelled to arrive at this conclusion, again, from the averments of the applicant in the plaint that he has pleaded with the respondents to file a succession cause in vain.

It appears to me that the applicant has used the term legal representative loosely without appreciating that it is a term of art used only in reference to a person to whom letters of administration have been issued.

Secondly no copies of the documents of title in respect of the two parcels have been exhibited and it is therefore difficult to confirm that indeed they are registered as alleged. Finally the application is seeking an injunction against the respondent and inhibition with regard to the entire No. 1591 yet what is in dispute is only one acre.

With all these questions remaining unanswered, it would be unconscionable to grant the prayers sought in this application. The same fails and is dismissed.

I make no orders as to costs.

Dated at Meru this 19th day of January 2009.

W. OUKO

JUDGE