



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 61 of 2008

EDWIN KANGETHE WACHIRA

(Suing as a personal representative of the estate of

**WACHIRA ARAM GITHANDA).....1ST
PLAINTIFF**

LIZZIE NJAMBI WACHIRA *(Suing as a personal representative of the
estate of*

**WACHIRA ARAM GITHANDA).....2ND
PLAINTIFF**

Versus

**JOHN MAINA
MUTERO.....DEFENDANT**

RULING

The plaintiff brought this action against the defendant alleging that the defendant had trespassed and was in occupation of property **LOC 20/GITHURI/910**. That property is registered in the name of Wachira Aram Githanda deceased. The plaintiffs bring the suit as personal representatives of that estate. By their plaint the plaintiffs seek to restrain the defendants, his servants or agents from entering that property, cultivating, harvesting or planting any plant. Further the plaintiffs seek in the plaint mandatory injunction against the defendant, his servants and agents, ordering him to vacate and hand over the vacant possession of that property. The plaintiffs brought by way of certificate of urgency a Chamber Summons dated 12th June 2008. The plaintiff seeks temporary injunction pending the hearing of the suit in terms of the prayers in the plaint. When the matter initially came before court, the court ordered that the matter be heard on priority basis. When it was fixed for hearing interparties on 19th June 2008 the respondent although served did not attend court. The court granted interim orders and ordered that the defendant be served for hearing interparties on 8th July 2008. Again although there was evidence of service the defendant did not attend court nor file any papers in opposition to the application. In support of the application the plaintiffs deponed that they were personal representatives of the estate of the Late Githanda deceased. They annexed a limited grant of Letters of Administration issued by the court on 9th November 2004. They further deponed that the property LOC 20/GITHURI/910 was registered in the name of the deceased. In this regard a land certificate was annexed to the affidavit together with an extract of the green card and a certificate of official search. All these did indeed show that the property is

registered in the deceased name. In that affidavit the plaintiffs stated that the defendant had unlawfully trespassed that property and had illegally cultivated thereon and had embarked on illegal and unlawful wanton destruction of trees. Further that the defendant had illegally allocated four acres thereof to two women to cultivate. That the trespass by the defendant was continuing and the defendant by that trespass was illegally gaining from the proceeds of that land. The plaintiffs prayed for an injunction against the defendant. I have considered both the plaint and the application before me. I am satisfied that the plaintiffs by the application before court has well satisfied the principles enunciated in the case of *GIELLA V CASSMAN BROWN & CO. LTD (1973)* E. A. of granting an injunction. In my view the plaintiffs has shown a *prima facie* case with a probability of success. The plaintiffs' application and the issues raised therein remain to date unchallenged because the defendant though served has not entered an appearance nor filed documents in opposition to the application. The plaintiffs have shown the property in question is registered in the name of the deceased whose estate they have been appointed as personal representatives. The statement that the defendant is engaging in wanton destruction of trees and plants on that land is clear indication that the damage which the plaintiff will suffer will be irreparable. The plaintiff by the application has also sought mandatory injunction against the defendant. In this regard it is of importance to consider what the authorities have to say in respect of mandatory injunction. In the *Despina Pontikos (1975)* EA 38 at 57, the East African Court of Appeal said:-

“..... this court held more than once that interlocutory mandatory injunctions should only be granted with reluctance and only in very special circumstances.”

In England, in the case of *Locabail international Finance Ltd v Agroexport (1986) 1 All ER 901*, the Court of Appeal held that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

The Court of Appeal in the case of *DIAMOND TRUST BANK (K) LTD V JASWINDER SINGH ENTERPRISES (1999) 2 E.A* held:-

“The granting of a mandatory injunction ended the case and left the appellant unprotected. The court should bear in mind that to grant the injunction would mean giving them judgment without giving the other party a right of trial”.

The special circumstances which warrant this court granting a mandatory injunction against the defendant are that if the defendant is allowed to continue in occupation of the property he will continue in his wanton destruction of trees and plants and will also likely lease out the land to other persons. The facts of this case sufficiently show that it is necessary for a mandatory injunction to be granted as prayed. The orders of the court are:

- 1. That the defendant be and is hereby restrained by himself, his employees, servants and agents from entering, trespassing, cultivating French beans, maize or any other plants, harvesting, removing any crop, plant or any item from the land LOC 20/GITHURI/910 pending the hearing and determination of this suit.**
- 2. That a mandatory injunction is hereby issued against the defendant by himself, his employees, servants and agents ordering the defendant forthwith to vacate and hand over vacant possession of the parcel of land LOC 20/GITHURI/910.**
- 3. The Plaintiffs are awarded costs of Chamber Summons dated 12th June 2008.**

DATED AND DELIVERED THIS 30TH DAY OF JULY 2008

MARY KASANGO

JUDGE