



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

**Civil Appeal 118 of 2007**

**KIINGA MWANZWII ..... APPELLANT/APPLICANT**

**VERSUS**

**KITHOME NYAMU ..... RESPONDENT**

**RULING**

1. The Application dated 11/1/2008 is premised on Order XXXIX Rule 1 (a) (b) and Rule 3 (1) and 2 of the Civil Procedure Rules and the specific orders made are:-

a. “THAT, the Respondent be hereby restrained by himself, agents servants, privies and/or anybody howsoever acting under his authority from in any manner interfering with the parcel of land in dispute pending the hearing and determination of this application interparties.

**b. THAT, the Respondent be hereby restrained by himself, agents servants, privies and/or anybody howsoever acting under his authority from in any manner interfering with the parcel of land in dispute pending the hearing and determination of Civil Appeal No.118 of 2007 herein.**

**c. THAT, the costs of this application be met by the Respondents in any event.”**

2. The grounds in support are as follows:

**i. THAT, the Respondent have forcibly entered into the land and are threatening to evict the Applicant from his land which he has been occupying since 1936.**

**ii. THAT, the Applicant who has all along been in actual possession is now threatened with invasion of the land by agents of the Respondent thus disrupting his peace and security.**

**iii. THAT, the Appellant is dissatisfied by the whole of decision of the Provincial Appeals Committee sitting in Embu, in its Civil Case No.32 of 1999 and hence has appealed against the same.**

**iv. THAT, the Appellant/applicant is bound to suffer irreparable damage if the orders sought herein are not granted.**

**v. THAT, it is in the wider interest of justice that the orders sought do issue.”**

3. The background to the Application from the Supporting Affidavit of Kiinga Mwanzwii is that the parties were also parties to Mwingi District Land Disputes Tribunal’s Case Number 4 of 1989 which was concluded on 23/4/1999 in favour of the Respondent. The subsequent appeal being Provincial Appeals

Committee at Embu in its case Number 32 of 1999 upheld the Tribunal's decision that the Applicant be evicted. His case is that he will suffer irreparable injury if he is so evicted as he has lived on the land since 1939 and yet he has an appeal with high chances of success.

4. In his Replying Affidavit sworn on 20/3/2008 the Respondent depones that the Applicant is not in occupation of the suit land as he was evicted in the year 2000 and that he now lives outside that land which is occupied and is in the possession of the Respondent.

5. I have taken into account the submissions by the advocates appearing and I am convinced that the Application has no merit for the following reasons;

Firstly, an interlocutory injunction in the nature sought by the Applicant cannot be granted when the Applicant is in fact neither in occupation of nor in possession of the disputed land. This is because there is nothing to injunct and yet a mandatory injunction to reinstate the Applicant is not being sought. In any event, the Respondent has raised the issue and the Applicant has failed to traverse it in any way.

Secondly, and as a corollary to the above, an injunction cannot be granted if the Applicant fails to show that he has a prima facie case with a chance of success. In this case, I have seen the proceedings before the Kyuso Land Disputes Tribunal and the Eastern Provincial Appeals Committee. Prima facie it is my view that ab initio the Applicant's case is of the weakest kind. I say so because his claim to the suit land is premised on no more than forced entry to land that the Respondent inherited from his father. More seriously however are the contents of the "**Petition of Appeal**" dated 11/6/2007. That document has four (4) grounds. None of them raise any matters of law. Section 8 (9) of the Land Disputes Tribunals Act provides as follows:-

**"(9). Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:**

**Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that Court has certified that an issue of law (other than customary law) is involved."**

6. For avoidance of doubt and to show the problem, the grounds are as follows:-

i. **"The said Appellate Tribunal erred in law and fact when it proceeded to consider irrelevant factors in its evidence and lacked locus as the original owners, were dead and no administration had been done.**

ii. **The Learned Appeal's Court failed to make a reasoned decision that did not analyse the evidence on record.**

iii. **The said decision offends the land and amounted to a denial to the Appellant of the right to own property as enshrined in the constitution.**

iv. **The said decision confirms that the Appellants had stayed in the land since 1936 to date and the law allows ownership by prescription."**

7. Prima facie where the grounds do not confirm to the expectations of law, the Appeal will be summarily rejected and there is nothing to be heard. As was said in **Giella vs Cassman Brown (1973) E.A. 358**, where a party fails to show a prima facie case with a probability of success, it is difficult for any court to grant an interlocutory injunction. This is the situation obtaining in this case.

8. Lastly, the Applicant is out of the suit land and I see no damage that he may suffer if the injunction is not granted and in any event on a balance, the scales of discretion must tilt in favour of the Respondent.

9. Since I see no merit in the Application dated 11/1/2008, the Application is dismissed with costs to the Respondent.

10. Orders accordingly.

Dated and delivered at Machakos this **15<sup>th</sup>** day of **October** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mrs Nduva h/b for Mr Nzilli for Appellant**

**Mr Mutuku h/b for Mr Mung'ata for Respondent**

ISAAC LENAOLA

JUDGE