



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

**Civil Case 233 of 2007**

**TUNA JUMA KHAN.....PLAINTIFF/APPLICANT**

**VERSUS**

**JULIUS TOTONA.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff, Tune Juma Khan filed suit against the defendant, Julius Totona seeking an order of this court to permanently restrain the defendant from entering, cultivating or asserting any rights to the parcel of land known as CIS MARA/OLOLUNGA/10973 (*hereinafter referred to as the suit land*). Contemporaneous with filing the suit, the plaintiff filed an application under the provisions of Order XXXIX Rule 1(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an order of injunction to restraint the defendant from ploughing, planting, cultivating, entering or dealing with the suit land in any manner that would be inconsistent with the rights of the plaintiff. The grounds in support of the application are stated on the face of the application. The plaintiff contends that the defendant had entered into the suit land, cultivated the same and was preparing to plant crops in a purported assertion of his land rights. The plaintiff contends that the defendant had not acquired any lawful or beneficial interest on the suit land which was still registered in the name of the estate of the deceased. The plaintiff stated that the defendant's conduct constituted a tort of trespass which was prejudicial to the interests of the plaintiff. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. The defendant filed a replying affidavit in opposition to the application. He deponed that he was the lawful owner of the suit land having purchased the same from the administrators of the estate of the deceased. The defendant deponed that he had been in occupation of the suit land since 1983 when he took possession of the same. He maintained that he was the recognised owner of the suit land and further that he had paid the survey fees to enable the said parcel of land to be subdivided to enable him to get his portion of land. He deponed that the reason the suit property had not been transferred to him was because of the pending dispute between the beneficiaries of the estate of the deceased on how the said estate was to be distributed, which dispute was still pending determination by the court. He deponed that he had the right to cultivate the suit land because he has always been in possession. He urged the court to dismiss the plaintiff's application as it was based on incorrect facts.

At the hearing of the application, I heard the submission made by Mr. Githui on behalf of the plaintiff. He reiterated the contents of the application together with the supporting affidavit. He submitted that the plaintiff's claim was based on trespass. He maintained that the defendant had occupied the suit and cultivated the same without any legal justification. He submitted that the defendant had purchased the suit land from one of the administrators of the estate of the deceased who did not have legal capacity to dispose of the land or vest any legal rights on the defendant. He maintained that the sale agreements which the defendant was purporting to rely on in support of his occupation of the suit land had no legal basis. He submitted that no transfers or the consent of the land control board had been secured to enable the said sale of the suit property to be legally validated. He argued that the defendant could not therefore claim that he had a legally registrable interest on the suit land. He maintained that the defendant was a trespasser. Mr. Githui urged the court to find that the plaintiff had established a prima facie case to enable this court grant the order of injunction sought.

Mrs. Ndeda for the defendant opposed the application. She reiterated the contents of the replying affidavit. She submitted that the plaintiff had not come to court with clean hands because she had failed to disclose material facts to the court. She maintained that the plaintiff failed to disclose to the court the existence of a succession dispute between the beneficiaries of the deceased's estate, which dispute had not been resolved. She submitted that the plaintiff took occupation of the suit land in 1983 when he purchased the same from the administrators of the deceased's estate. She submitted that the said administrators of the estate of the deceased, had legally sold their interest to the defendant. She maintained that the plaintiff had no legal right to sue the defendant since she was not the registered owner of the suit property. She conceded that the purchase of the suit land by the defendant had not been sanctioned by the Land Control Board. She however maintained that the reason the consent was not granted was due to the fact of the pendency of the succession dispute in court. She reiterated that the defendant had purchased the suit property with the consent of the beneficiaries of the estate of the deceased. She urged the court to dismiss the application with costs.

I have carefully considered the rival submissions made by the parties to this application. I have also read the pleadings filed by the said parties in support of their respective positions in this application. The issue for determination by this court is whether the plaintiff has established a case to enable this court grant the application of injunction sought. The principles to be considered by this court in determining whether or not to grant an application for injunction are well settled. The applicant must establish that he has a prima facie case with a likelihood of success. He must also establish that he would suffer irreparable damage if injunction is not granted. In the event that the court would be in doubt, it would determine the application on a balance convenience. (*See Giella vs Cassman Brown [1973] E.A 358*).

In the present application, the plaintiff claimed that the defendant entered into an agreement with some of the administrators of the estate of the deceased and purported to have purchased the suit land which is yet to be distributed to the beneficiaries of the deceased. It was acknowledged by both the plaintiff and the defendant that the distribution of the estate of Alima Ngibioto Letome – deceased had not been undertaken due to the fact that some of the beneficiaries had lodged objections in the succession proceedings. The said succession proceedings are yet to be determined. The plaintiff claimed that the defendant had no legal right to occupy or to cultivate the suit land. On his part, the defendant stated that he had legitimately purchased the suit land from one of the beneficiaries of the deceased's estate, who also happens to be one of the administrators of the estate of the deceased.

To establish that she has a prima facie case, the plaintiff must establish that she has a right recognised by the law over the suit property. In the present application, the plaintiff has established that she is one of the beneficiaries of the estate of the deceased. She has however failed to establish that she would be entitled to the suit land once the estate of the deceased is distributed. In view of the dispute over distribution that is pending determination, the plaintiff cannot claim the suit parcel of land. Upon distribution, there is a possibility that the suit land would be inherited by Mohammed Khan, the beneficiary of the estate of the deceased who sold the same to the defendant. I have also considered the defendant's claim that he has been in occupation of the suit land since 1983. The plaintiff did not dispute this fact. In fact, in her plaint, the plaintiff acknowledged the fact that the defendant is in possession of the suit land. Prohibitory injunction will only be granted in circumstances where there is a threat that status quo would be interfered with. In the present application, the status quo is that the defendant is in occupation of the suit land. This court would not grant an order in vain. It appears that the plaintiff, in actual fact seeking the eviction of the defendant from the suit land by the backdoor.

I do hold that the plaintiff has failed to establish that she has a prima facie case with a likelihood of success. She has failed to establish that she has a legal right to own or possess the suit land. She has further failed to explain to the court why she wishes to upset the acknowledged status quo on the ground which is that the defendant is in possession of the suit land. The plaintiff has further failed to establish what irreparable damage she would now suffer that she has not suffered during the entire period that the defendant has been in occupation of the suit land. I find no merit to the application. I hereby dismiss it with costs to the defendant.

**DATED at NAKURU this 23<sup>rd</sup> day of November 2007**

**L. KIMARU**

**JUDGE**