



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

**ELC CASE NO. 337 OF 2015**

**KING'ANGI CHAMBIRA.....PLAINTIFF/APPLICANT**

**VERSUS**

**JACOB NJUE J. MUTEMBEI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MBOGO NJUKI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**CHARLES NJERU KIURA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**MWATHI NTHIGA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**DAVID MWANIKI NGUKU.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

This is in respect to the plaintiff/applicant's Notice of Motion dated 30<sup>th</sup> October 2015 and filed herein on the same day in which he seeks the following orders:-

1. *Spent*
2. *Spent*
3. *That the Honourable Court be pleased to issue a temporary injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants by themselves, their agents, workmen, agents or otherwise howsoever from disposing, selling, alienating, sub-dividing, leasing, charging, transferring, entering upon, taking possession of, evicting, attempting to evict, preventing or in any other way interfering with the plaintiff's use and occupation of parcels of land No. MBEERE/KIRIMA/3688, MBEERE/KIRIMA/3694, MBEERE/KIRIMA/3695, MBEERE/KIRIMA/3696 and MBEERE/KIRIMA/3697 pending the hearing and determination of this suit.*
4. *That in the alternative to prayer 3 above, this Honourable Court be pleased to order that status quo regarding plaintiff's peaceful occupation and access to parcels of land No. MBEERE/KIRIMA.3688, MBEERE/KIRIMA/3694, MBEERE/KIRIMA/3695 MBEERE/KIRIMA/3696 and MBEERE/KIRIMA/3697 be maintained pending the hearing of this suit.*
5. *That costs be provided for.*

The application is premised on the grounds set out therein and supported by the applicant's affidavit in which it is deponed, inter alia, that the land parcels No. MBEERE/KIRIMA/3688, MBEERE/KIRIMA/3694, MBEERE/KIRIMA/3695, MBEERE/KIRIMA/3696 and

MBEERE/KIRIMA/3697 (the suit land) were a resultant sub-divisions of land parcel No. MBEERE/KIRIMA/3394 which belongs to the MARIGU Clan of which he was a member and therefore was entitled to a share and he has since 1970 been occupying a portion measuring approximately 10 acres which he has extremely developed with over 3000 mature khat plants, 50 bananas sugar cane, 50 mature trees, 20 mature mango trees, 50 pawpaw trees among other developments photographs of which were annexed (annexture **KC 2**). That the 1<sup>st</sup> respondent who was elected to represent their clan and who was responsible for sharing out the clan land to the beneficiaries sub-divided the applicant's entitlement into nine (9) portions which he transferred to himself, the other respondents and the applicant's sons leaving him landless. He therefore fears that the respondents may evict him and sell the suit land which would cause him irreparable loss. The applicant also annexed to his application the certificates of search showing that indeed the suit land is registered in the respondents' names.

The application was resisted and in a replying affidavit sworn by JACOB NJUE J. MUTEMBEI the 1<sup>st</sup> respondent herein on behalf of the other respondents, it is deponed that this application is misconceived, frivolous and an abuse of the Court process. He states that at the time of adjudication, he was the Chairman of their clan and was responsible for sharing out land to the beneficiaries and each member was given six (6) months to lodge complains which the applicant did not and has infact moved to his land and so he is not landless. The respondents being the registered proprietors of the suit land are therefore free to deal with the same as they wish and no loss will be suffered by the applicant who is not in occupation of the suit land.

But in a supplementary affidavit, the applicant deponed, inter alia, that the allocation of the land was done secretly and not equitably and that he developed the suit land because he knew that the same would be registered in his names.

Submissions have been filed both by Ms Rose Njeru advocate for the applicant and Mr. Muyodi advocate for the respondents.

I have considered the application, the rival affidavits and annextures thereto and the submissions by counsels.

An application for temporary injunction has to be determined as laid down in the case of **GIELLA VS CASSMAN BROWN & COMPANY LTD 1973 E.A 358** which is that:-

1. ***The applicant must show a prima facie case with a probability of success.***
2. ***Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and;***
3. ***If in doubt, the Court will determine the application on a balance of convenience.***

In the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS (2003) K.L.R 125**, the Court of Appeal defined a prima facie case as one which, on the material presented to the Court, a tribunal directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal by the latter.

It must also be remembered that an interlocutory injunction is a discretionary equitable remedy and therefore it will not be granted where it is shown that the applicant's conduct with respect to the subject matter in dispute does not meet the approval of a Court of equity. Put another way, the applicant must approach the Court with clean hands. Finally, as was held in the case of **FILMS ROVER INTERNATION VS CANNON FILS 1986 3 Ch. D 772**, the Court in considering an application such as this will normally take the course that appears to carry the lower risk of injustice.

The principles enunciated in the above cases will guide this Court in determining the application. It is common ground that the suit land is registered in the names of the respondents. That registration is under the now **repealed Registered Land Act** and under **Sections 27 and 28** of that Act, the respondents are entitled to all the rights and privileges belonging or appurtenant thereto. Similar provisions are found in

**Sections 24 and 25 of the Land Registration Act.** It is not clear from the plaint on what basis the applicant is claiming the suit land. There is no pleading with regard to trust or adverse possession except that he claims that the suit land was originally part of the parcel No. MBEERE/KIRIMA/3394 which belonged to the MARIGU Clan of which he is a member and he has been in possession of approximately ten (10) acres out of that land by virtue of being a member of that clan. He adds further that he and his family have extensively developed the portion that they occupy for the last fifty (50) years. He annexed photographs of the land that he occupies which show the crop and home thereon – annexure **KC 2**. It must be realized that mere occupation of land, with nothing more, may not by itself be enough to acquire an interest in the same. While the Court is alive to the fact that a party has the right to amend his pleadings, at this stage of these proceedings, I am un-able to see what prima facie case the applicant has established to warrant the order of temporary injunction. There is a doubt in my mind if the applicant has been able to surmount the first principle in the **GIELLA** case (supra).

On the second limb of the **GIELLA** case (supra), the applicant has deponed in paragraph twenty two (22) of his supporting affidavit that if the suit land is sold, transferred or otherwise disposed off, then he will be rendered landless and destitute and the purpose of this suit will be nugatory as it is his only source of livelihood. He claims that as a member of the Marigu Clan, he is entitled to the suit land. He therefore depones in paragraph twenty four (24) of his supporting affidavit as follows:-

***“That I stand to suffer irreparable loss and damage if the parcels of land are disposed off or in the event that I lose the developments on the parcels of land”***

The 1<sup>st</sup> respondent countered this in paragraph sixteen (16) of his replying affidavit wherein he has deponed as follows:-

***“That the plaintiff has not demonstrated how he will suffer loss or prejudice if the orders are not granted as he is not the registered proprietor and has no rights and/or interest over the said land”***

In a situation such as this, the Court will do well to take note of the words of the Court of Appeal in the case of **MUIRURI VS BANK OF BARODA (KENYA) LTD 2001 K.L.R 183** at page **188** where it said:-

***“Besides, disputes over land in Kenya evoke a lot of emotions and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”***

I think that statement is applicable in the circumstances of this case. Whereas the 1<sup>st</sup> respondent has deponed in paragraph seventeen (17) of his replying affidavit that the applicant is not in occupation nor has he developed the suit land, photographs of the crop and developments on the suit land have been annexed and their authenticity has not been challenged. I think given those circumstances and the fact that the applicant has deponed to having occupied the suit land for fifty (50) years or thereabout, that is enough to satisfy this Court that irreparable loss would ensue if the applicant is evicted from the suit land or if it is transferred. The applicant has therefore met principle two of the **GIELLA** case (supra).

The application however, will be determined on the balance of convenience and in doing so, I will abide by the words of the Court in the case of **FILMS ROVER INTERNATIONAL** (supra) and take the course that will carry the lower risk of injustice. The applicant has deponed, and this Court believes him, that he has been occupying some ten (10) acres of the suit land for the last fifty (50) years which he has extensively developed. A greater injustice would be meted out to him if his only source of livelihood was to be alienated before the trial. On that consideration, this Court is persuaded to grant the orders of temporary injunction sought herein.

In the circumstances therefore, the applicant’s Notice of Motion dated 30<sup>th</sup> October 2015 is allowed as prayed with costs being in the cause.

It is further directed that the parties herein do expedite compliance with **Order II Civil Procedure Rules** and have the suit determined within twelve months from the date of this ruling otherwise the injunction

shall lapse unless the Court orders otherwise.

**B.N. OLAO**

**JUDGE**

**11<sup>TH</sup> MARCH, 2016**

Ruling delivered in open Court this 11<sup>th</sup> day of March, 2016.

Ms Muthoni for Ms Njeru for the Plaintiff/Applicant present.

Ms Muthike for Mr. Okwaro for the Defendant/Respondent present.

Mr. Nyaga Court clerk present.

**B.N. OLAO**

**JUDGE**

**11<sup>TH</sup> MARCH, 2016**