



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. NO. 673 OF 2013**

**JAMES CHUCHU KARIUKI..... PLAINTIFF**

(Suing as Administrator of the Estate of Kariuki Kuogothoka)

**VERSUS**

**ESBON ONGORO ANDIKA.....1<sup>ST</sup> DEFENDANT**

**JOSEPH OTIENO MIDAN.....2<sup>ND</sup> DEFENDANT**

**SUSAN BEKA KASOME.....3<sup>RD</sup> DEFENDANT**

(Being sued in their capacity as officials of SAHAKIA DEVELOPMENT YOUTH)

**RULING**

Coming before me for determination is the Notice of Motion dated 5<sup>th</sup> June 2013 later replaced with the Notice of Motion dated 26<sup>th</sup> June 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants/Respondents from trespassing onto or dealing in any way with the land parcel known as Land Reference No. 9363/64 (hereinafter referred to as the "Suit Property") pending the hearing and determination of this Application and suit. He also seeks that this court directs the local Officer Commanding Police Station with authority over Kayole to enforce those orders. The Plaintiff/Applicant also seeks that costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of James Chuchu Kariuki, the Plaintiff/Applicant, sworn on 26<sup>th</sup> June 2013 in which he averred that he is a duly appointed administrator of the estate of the Kariuki Kuogothoka. He further produced a Certificate of Title over the Suit Property in the name of the said Kariuki Kuogothoka, the Grant of Letters of Administration Intestate issued on 30<sup>th</sup> July 2012 together with a demand letter dated 10<sup>th</sup> May 2013 from his advocates to the Respondents who he claimed were trespassing onto the Suit Property. He further stated that unless stopped by injunction, the Respondents shall continue to unlawfully trespass on and waste the Suit Property resulting in the beneficiaries thereof suffering loss and damage.

The Application is contested. Susan Kasome Mbeke, the 3<sup>rd</sup> Respondent, filed her Replying Affidavit sworn on 24<sup>th</sup> July 2013 in which she averred that she is the current secretary of Sahakian Development Self Help Youth Group (hereinafter referred to as the “Group”). She averred that the Group has been in uninterrupted peaceful occupation of the Suit Property since its inception in the year 1994 and hence are entitled to the land by adverse possession. She exhibited a copy of the registration certificate of the Group and further stated that the Group had applied to the High Court for an order to be registered as the proprietors of the Suit Property. She exhibited the pleadings of ELC No. 699 of 2013 (O.S.) to demonstrate that fact. She further averred that the Plaintiff’s Certificate of Title was fraudulent as it was issued in the year 1996 when the Respondents had already settled on the Suit Property and carried out developments thereon. She then emphasized that it was factually incorrect for the Plaintiff/Applicant to aver that they were trespassing the Suit Property. She further stated that the Plaintiff/Applicant has not established any interest whatsoever on the Suit Property to warrant the grant of the orders sought for herein. Further, she intimated that the Plaintiff/Applicant could be compensated with an award of damages if the court so found.

In response thereto, the Plaintiff/Applicant filed his Supplementary Affidavit sworn on 5<sup>th</sup> August 2013 wherein he averred that the Respondents have not been in actual or physical occupation of the Suit Property at any time. He further stated that the Respondents encroached onto the Suit Property in early 2013 and began to waste the land. He further stated that the Group’s certificate of registration is irrelevant as it does not indicate that the Respondents were or are based on the Suit Property. He also stated that no suit papers have been served upon him by the Respondents and further that no order has been made. He also stated that no developments have been made on the Suit Property by the Respondents and that their encroachment thereon amounts to trespass. He reiterated that the title issued in the name of his late father is conclusive proof of ownership of the Suit Property. He further emphasized that all the information regarding the ownership of the Suit Property is available at the land registry and is obtainable upon request. He further stated that the Respondents have been excavating the Suit Property and committing acts of wanton thereon and no monetary compensation could restore the land to its former state.

Both the Plaintiff/Applicant and the Defendants/Respondents filed their written submissions which have been read and taken into account in this ruling.

I have carefully considered the Affidavits, the written submissions and the authorities relied on. This is an injunction application and the principles applicable were well settled in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

***“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly 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 from the latter.”***

Turning to this case, the Plaintiff/Applicant is the sole administrator and one of the beneficiaries of the estate of the late Kariuki Kuogothoka, his father. To prove this position, he produced the Grant of Letters of Administration. He has brought this suit on behalf of his late father’s estate which he is permitted to do by the law. To support his claim that the Suit Property rightfully belongs to the estate of his late father, he produced to the court the Certificate of Title to the Suit Property which is in the name of his said late father. To counter that assertion, the Respondents exhibited pleadings of a suit they have commenced

against the Plaintiff/Applicant being **ELC No. 699 of 2013**, in which they claim ownership of the Suit Property under the doctrine of adverse possession. The first issue to determine then becomes whether the Plaintiff/Applicant has established a prima facie case with high chances of success at the main trial. To my mind, it is clear that the Respondents only claim to the Suit Property emanates to the suit they filed for adverse possession. It is noteworthy that their suit was filed shortly after the Plaintiff filed this present suit. The Plaintiff/Applicant has even stated that he has not been served with any papers in that new suit. It would appear to me that the Respondents filed their suit to counter the present suit. No orders or findings have been made in that latter suit and therefore the rights of the Respondents to the Suit Property remain a mere claim. On the other hand, the Plaintiff/Applicant has supported his claim over the Suit Property by producing the Certificate of title thereto in the name of his late father. The law is quite clear on such a claim as shown below.

**Section 24(a)** of the **Land Registration Act** provides as follows:

***“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”***

**Section 26 (1)** of the **Land Registration Act** states as follows:

***“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –***

- a. ***On the ground of fraud or misrepresentation to which the person is proved to be a party; or***
- b. ***Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

Based on these legal provisions, this court is duty bound to take the produced Certificate of title as prima facie evidence that the person named as proprietor of the Suit Property is the absolute and indefeasible owner thereof. Hence, I do find that the Plaintiff/Applicant has established a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? Land is unique and no one parcel can be equated in value to another. The value of the Suit Property can be ascertained. However, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application with costs to the Plaintiff.

**SIGNED AND DELIVERED IN NAIROBI THIS 14<sup>th</sup> DAY OF March 2014**

**MARY M. GITUMBI**

**JUDGE**