



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 111 OF 2016**

**STANLEY KIGOTHO MIANO.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOB KIMOTHO MIANO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOHN MURIMI MIANO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

This is in respect to the plaintiff's Notice of Motion dated 20th July 2016 seeking the following reliefs:

**1. Spent.**

**2. Spent.**

**3. That before the hearing and determination of this application, this Honourable Court be pleased to issue an order to the defendants to vacate the suit property forthwith and deliver vacant possession to the plaintiff/applicant and in default, an order of eviction to issue evicting the defendants from the suit property.**

**4. That before the hearing and determination of this application, an injunction do issue restraining the defendants from illegally trespassing, occupying or in any way interfering with the plaintiff's parcel of land known as KIINE/KIANGAI/3399.**

**5. That this Honourable Court be pleased to issue orders to the OCS Kigatho Police Station restraining his officers from further interference and intimidation based on the defendants baseless complaints and further order that the OCS Kigatho Police Station assist in ensuring that the orders given are duly implemented.**

**6. Costs of this application.**

The application is based on the grounds set out therein and also supported by the affidavit of **STANLEY KIGOTHO MIANO** the plaintiff herein. The gist of the application is that the plaintiff is the registered proprietor of land parcel No. KIINE/KIANGAI/3399 (hereinafter the suit land) and that in April and July 2016, the defendants, accompanied by Police officers, illegally evicted the plaintiff's employees therefrom and prevented them from carrying out activities on the said land yet the plaintiff is the rightful owner of the suit land which was demarcated and transferred to him by his father **GEORGE MIANO KIBUGA**. The plaintiff is therefore un-able to develop the suit land and has been deprived of the same in contravention of his Constitutional right. Annexed to the application is a copy of title deed in respect

to the suit land – annexure **SM 2**.

The application is opposed and in his replying affidavit, the 1st defendant **JOB KIMOTHO MIANO** has deponed, inter alia, that the plaintiff is his elder brother and is the registered proprietor of the suit land which is a sub-division of land parcel No. KIINE/KIANGAI/824 registered in the names of their father. However, there are no boundaries marked on the ground and therefore it is impossible to identify where the suit land as well as the other parcel No. KIINE/KIANGAI/3400- (also a sub-division of land parcel No. KIINE/KIANGAI/824) are situated. In an effort to have the boundaries determined, he had called for a family meeting but was served with Court papers. He adds that this suit is premature as the parties are in the process of negotiating on how to engage a surveyor. Annexed to that replying affidavit are copies of certificate of search showing that land parcel No. KIINE/KIANGAI/824 and KIINE/KIANGAI/3400 are registered in the names of their father **GEORGE MIANO KIBUGA** – annexures **JKM 1 and 2**.

On his part, the 2nd defendant **JOHN MURIMI MIANO** also a younger brother of the plaintiff admits that the suit land is registered in the names of the plaintiff which is a sub-division of land parcel No. KIINE/KIANGAI/824 belonging to their father **GEORGE MIANO KIBUGA**. However, while subdividing the original land parcel No. KIINE/KIANGAI/824, their father and mother **LEAH MUTHONI MIANO** were to have a life interest in the whole original land parcel which included 3,000 tea bushes. That due to their advanced age, their parents commanded the 2nd defendant to take care of the tea bushes and sell it on behalf of his mother which he has been doing since 1995 to-date. He denied having entered the plaintiff's land adding that he (plaintiff) has at all time been residing and continues to reside in the United States of America and never visited Kenya between 2014 to-date and therefore the supporting affidavit is perjurious and should be expunged. That the plaintiff's cause of action, if any, lies against their parents.

As the parties are siblings, and in the spirit of trying to pursue an out of Court settlement under **Article 159 of the Constitution**, this Court encouraged the parties to try and settle the dispute when this application was first placed before me on 15th August 2016. However, notwithstanding all the efforts both by the parties counsels and this Court, a settlement became elusive and on 10th November 2016, it was agreed that the parties file their written submissions and on 15th May 2017, it was confirmed that those submissions had been duly filed and served as directed.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.

To begin with, I must express my displeasure at the poor manner in which the application dated 20th July 2016 is drafted. Apart from seeking orders that cannot be granted in such an application, such as an order for eviction, the application is essentially seeking orders of injunction pending trial but is worded all through as if it is only seeking orders for temporary injunction pending inter-parte hearing. I have invoked my jurisdiction under **Article 159 (2) (d) of the Constitution** to save the application. Counsel must however remember that they have a duty to assist the Court meet its overriding objectives of delivering expeditious justice to the parties and imprecise pleadings hinders the Court in achieving that objective.

Having said so, the application dated 20th July 2016 seeks an order that the defendants vacate the suit land. Such an order cannot be issued at this stage. It must await the trial of this suit. The other order seeks that the OCS Kigatho Police Station restrains his officers from interfering and intimidating the plaintiff. The role of the Police is to maintain law and order. Not to intimidate members of the public and if they are, as alleged by the plaintiff, interfering in this land dispute, I must remind them of their responsibilities which are clearly set out in the **National Police Service Act** and specifically **Section 24** thereof. Other than maintain law and order, the Police should not be involved in civil disputes. In the case of **KAMAU MUCUHA VS RIPPLES LTD 1993 K.L.R.**, **KWACH J.A** expressed himself on this issue as follows:

***“The only criticism of the order of the Judge which I can see as of now, but which does not swing the scale one way or the other in this application, is the direction that the assistance of the***

***Police should be enlisted to secure compliance by the applicant. The Police should never be involved in such matters as there is specific provision for the enforcement of an injunction under Order 21 rule 28 of the Civil Procedure Rules”***

If it is true therefore that the Police are being used by the defendants to intimidate the plaintiff over this dispute, I take this earliest opportunity to caution them that they have no role in taking sides in civil disputes and must confine themselves to their roles as set out in the Act that governs them.

As stated earlier in this ruling, the plaintiff’s main prayer is an order for temporary injunction to restrain the defendants from illegally trespassing, occupying or in any way interfering with the suit land. It is common ground, and the defendants admit it in their replying affidavits, that the suit land is registered in the names of the plaintiff. As the registered proprietors of the suit land, the plaintiff is entitled, under ***Section 24 of the Land Registration Act***, to enjoy all the rights and privileges belonging or appurtenant thereto. Such rights and privileges no doubt include the right to a quiet enjoyment of the suit land without intrusion of whatever nature. There is no evidence placed before me to suggest that the plaintiff is registered as proprietor of the suit land in trust for the defendants or any other person. The defendants suggest in their replying affidavits that although the suit land is registered in the names of the plaintiff, their father gave them a life interest over the original land parcel No. KIINE/KIANGAI/824 and therefore they are entitled to the 3,000 tea bushes. The truth however is that land parcel No. KIINE/KIANGAI/824 no longer exists and following its sub-division into two parcels of land including the suit land which was transferred to the plaintiff by their father, he is entitled to an order of interim injunction to protect his interest therein. The principles for the grant of such an order were set out in the case of ***GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358***. They are:

- 1. The applicant must show the existence of a prima facie case with a probability of success at the trial.***
- 2. An interim injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot adequately be compensated by an award of damages.***
- 3. If in doubt, the Court will determine the application on the balance of convenience.***

A prima facie case was defined in the case of ***MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)*** as:

***“..... 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”***

In the case of ***NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS CIVIL APPEAL No. 77 of 2012***, the Court of Appeal while considering what a prima facie case is said:

***“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merit of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”.***

On the material available before me, the plaintiff is the registered proprietor of the suit land. It is not suggested that he obtained the title thereto through illegal means and neither is it alleged that he holds it in trust for the defendants or any of his other siblings. Clearly, he has established a prima facie case to warrant the order of interim injunction pending trial.

Secondly, on the issue of whether or not damages are an adequate remedy, the plaintiff’s case is that the defendants are trespassing on the suit land making it difficult for him to work on it. The defendants, as I have stated earlier, are of the view that they have a life interest in the suit land and particularly to work on and sell the tea thereon. It is not clear how much of the 3,000 tea bushes are on the suit land. What is

clear however is that the defendants have no right to the suit land and by entering it, they are trespassers. In the case of **JAJ SUPER POWER CASH AND CARRY LTD VS NAIROBI CITY COUNCIL & OTHERS C.A CIVIL APPEAL No. 111 of 2002**, the Court of Appeal stated thus:

***“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it”***

The 2nd defendant has deponed in his replying affidavit that the plaintiff is in any case residing in the United States of America and at no time has he visited the suit land. The 2nd defendant has also deponed that the plaintiff’s affidavit is perjurious. No evidence has been placed before me to suggest that the plaintiff’s signature on his supporting affidavit is a forgery and this Court must, in the absence of such evidence, consider it to be the genuine signature of the plaintiff and that the said affidavit was sworn by him. On the issue that the plaintiff does not reside on the suit land, that does not mean that another party should trespass thereon. The plaintiff has rights protected by **Article 40 of the Constitution** to own the suit land. The plaintiff, by virtue of the registration of the suit land in his names, is therefore in possession of the same. Possession has been defined in **BLACK’S LAW DICTIONARY 9<sup>th</sup> EDITION** as:

***“The fact of having or holding property in one’s power; the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object”.***

As the registered owner of the suit land, the plaintiff is indeed at liberty to dispose of the same should he wish to do so. In **GEORGE ORAGO VS GEORGE LEIWA JAGALO & OTHERS C.A CIVIL APPEAL No. 62 of 2009 (2010 e K.L.R)**, the Court of Appeal while considering the grant of an injunction to a party in possession of land stated that:

***“The Appellant was in possession. Prima facie, he is the owner of the land. The denial of injunction has the effect of dispossessing the Appellant of his land. The purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property”***

The plaintiff has indeed deponed in paragraphs 6 and 7 of his supporting affidavit as follows:

***6: “That on or before April 2016, despite my notice and in total disregard to my request made in utmost good faith, the defendants illegally entered the suit property and illegal (sic) without approval evicted my employees/agents preventing them from carrying out my orders”***

***7: “That further on 9th July 2016, the 1st defendant accompanied by and colluding with two Police officers from Kigatho Police Station unlawfully entered and prevented plaintiff and his employees from lawfully carrying out their duties and obligations without any legal authority”.***

What the plaintiff is stating in the above paragraphs is that the defendants, in cahoots with the Police, are illegally preventing him and his agents from accessing the suit land and have in fact evicted him therefrom. I have already cautioned the Police that such conduct is improper and contrary to their role as custodians of justice. It is clear from the case of **GEORGE ORAGO** (supra) that in cases where the party in possession is being threatened with eviction, as is the case herein, then an order of injunction is merited.

The plaintiff has satisfied the first two grounds set out in the **GIELLA** case (supra) and as I am not in doubt, I need not consider the third ground. Even if I did, the balance of convenience would be in favour of granting the order of temporary injunction.

Ultimately therefore and upon considering all the matters herein, I am satisfied that the plaintiff has made

out a case to warrant the grant of an order of temporary injunction as prayed in the Notice of Motion dated 20th July 2016. I therefore allow the application and make the following orders:

***1. An order of temporary injunction is issued restraining the defendants either by themselves, their agents, servants, employees or anybody claiming under them from entering or dealing with the suit land No. KIINE/KIANGAI/3399 or in any way interfering with the plaintiff's possession thereof pending the hearing and determination of this suit.***

***2. In view of the serious allegations raised against the defendants and the Police with respect to their interference in land parcel No. KIINE/KIANGAI/3399, I take the liberty to draw their attention to the provisions of Order 40 Rule 3 of the Civil Procedure Rules which provides for imprisonment of upto six months for any person who disobeys this order.***

***3. As the parties are siblings, each shall meet their own costs.***

***4. The parties to comply with pre-trial directions so that this suit is heard and determined within the next twelve (12) months.***

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**

Ruling dated, delivered and signed in open Court this 14<sup>th</sup> day of July 2017

Mr. Ombongi for Mr. Miano for 2<sup>nd</sup> Defendant present

Mr. Gikunda for Mr. Onyango for Plaintiff present

Ms Nyagati for Mr. Kagio for 1<sup>st</sup> Defendant present.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**