



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 92 OF 2017**

**CHARLES MAINA MURIUKI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**JAMES KARUIRU MURAGE.....DEFENDANT/RESPONDENT**

**RULING**

1. The application before me filed by the plaintiff/applicant, is dated **25<sup>th</sup> May, 2017** brought under **Order 40 Rules 2(1) and 2** and **Order 51 Rule 1** of the Civil Procedure Rules seeking;

**(i) That there be an order restraining the defendant/respondent whether in person or through his agents, servants or employees from entering into, planting, tilling, culti- vating, harvesting crops thereon, charging, sub-dividing, transferring or in any way, dealing with land Title No. Kirimukuyu/Kiria/ 11 (hereinafter referred to as the suit property) pending the hearing and determination of this suit.**

**(ii) That costs of this application be provided for.**

2. The application is premised on the grounds set out in the application and is supported by the affidavit of **Charles Maina Muriuki** (the applicant herein) sworn on **25<sup>th</sup> May, 2017**. He depones that the suit property initially belonged to the family of Karuiru Muhinja; that the defendant/respondent became the registered owner on **13<sup>th</sup> March, 2017** by transmission; that half portion of the suit property was given to his grandmother Waruguru Karuiru who in turn gave it to him to cultivate and he has been in exclusive occupation and control todate; that after Njenge Muhinja died (owner of the other half portion), his sister leased Njenge Muhinja's half portion to the applicant to cultivate at Kshs.10,500/- for 3 years which he continued cultivating until **28<sup>th</sup> March, 2017** when the respondent issued him with a notice to vacate the suit property.

3. The application is opposed.

4. In his replying affidavit sworn on **15<sup>th</sup> June 2017**, James Kariuru Murage deposes that he became the registered owner of the suit property through succession proceedings. He denies that the applicant and his grandmother are relatives of the previous registered owner Njege Muhinja. It is his contention that the applicant leased the entire suit property from his mother, Elizabeth Gathoni, initially for three years but later extended the lease for another 3 years. She states that there was no problem between them until the applicant started cutting down trees resulting in the applicant been asked to account for the proceeds, been issued with a notice terminating the tenancy and also to vacate the suit property on **8<sup>th</sup> July, 2011**.

5. Injunctions are equitable remedies that are granted at the discretion of the court. The principles of granting such injunctions were laid down in the celebrated case of **Giella vs Cassman Brown** (1973) E.A 358 that:-

**“First, an applicant must show a prima facie case with a probability of success.**

**Secondly, an inter-locutory 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.**

**Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”**

6. It is noteworthy, that the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases. This observation was considered by Lord Diplock in **American Cyanamid Co. V Ethicon Limited** (1975) 1 ALL ER 504; (1975) A.C. 396 HL at 510 where he stated as follows:

**“It is no part of the Court's function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”**

7. In the instant case, although the applicant seeks an order of injunction on the grounds that he is an heir of the late Karuiru Muhinja, he has not produced any evidence to support the fact that his grandmother gave him her portion to cultivate.

8. Unlike the applicant who did not provide evidence to support his claim, the respondent<sup>2</sup> has annexed an agreement between Elizabeth Gathoni Murage and the applicant, marked JKMI in which the applicant leased 1.70 acres from the respondent's mother for a period of 3 years. In addition, he has annexed correspondences referring to the tenancy agreement marked JKM III, JKM IV, JKM V and a receipt by the respondent's advocate of Kshs.10,500/- received for lease of the suit property marked JKM III(I).

9. From the aforesaid annexures, it can be discerned that the applicant had leased 1.70 acres which is the entire suit property for a number of years from the respondent's mother and not the 0.70 acres he alleges.

10. Having failed to produce any evidence to support his claim, I find the applicant has failed to prove facts as required under **Section 107** of the Evidence Act.

11. On whether damages will be adequate to compensate the applicant for loss suffered, this been a claim for land, if it is found during trial that the applicant is entitled, the subject matter of the suit being land, the value can be easily ascertained in damages and he can be compensated.

12. On the balance of convenience, the respondent being the registered owner of the suit property, the balance of convenience tilts in his favour.

13. The upshot of the foregoing is that the application is found to be without merit and it is dismissed with costs to the respondents.

**Dated, signed and delivered in open court at Nyeri this 13<sup>th</sup> day of November, 2017.**

**L N WAITHAKA**

**JUDGE**

Coram:

N/A for the plaintiff/applicant

Mr. Ndirangu for the defendant/respondent

Court assistant - Esther