



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

**AT MURANG'A**

**E.L.C NO.145 OF 2017**

**JOSEPH NDUNGU KIRERU.....PLAINTIFF**

**VS**

**ELIJOHN CHEGE MUGO.....DEFENDANT**

**RULING**

1. This is an application brought by way of Notice of Motion dated the 6<sup>th</sup> February 2017, by the Plaintiff/Applicant against the Defendant/Respondent seeking to stop the Defendant from trespassing on the Applicant's property title No. LOC16/NDUNYU CHEGE/2 by building or putting up structures pending determination of this suit.

2. The Application is premised on the following grounds;

- a) The plaintiff/ applicant is the administrator of Mwangi Muiru alias Mwangi Muriu (deceased) who is the registered owner of all that parcel of land known as LOC.16 NDUNYU CHEGE
- b) THAT the plaintiff has been issued with letters of administration and certificate of confirmation of Grant and the Defendant is not one of the beneficiaries.
- c) The Defendant has unlawfully, illegally and without consent from the plaintiff encroached and trespassed in the suit premises and has commenced constructing a permanent house in the suit property occasioning great loss and damage to the plaintiff.

3. The application was supported by the supporting affidavit of Joseph Ndungu Kireru. He deponed that the suit property is the estate of Mwangi Muiru alias Mwangi Muriu, his deceased father to which the plaintiff was appointed the administrator and the estate was already distributed in Succession Cause No. 563 of 2014 at Murang'a. He urged the Court to stop the Defendant from constructing structures on the suit premises in the interest of fairness. That the Defendant is not a beneficiary of the said estate.

4. As expected the Respondent filed a reply to the application by asserting a beneficial interest in the suit property. That the suit property was family land and was a subject of the decision in the SRMCC No. 78 of 1973, Thika wherein the Court ruled in its judgement dated the 6.12.74 that the suit property be shared equally between four beneficiaries two of them were the plaintiff's father and the Defendant's father who are both now deceased. That unknown to him the Applicant secretly filed a succession cause No 563 of 2014, Muranga purposely to disinherit him of his father's share in the suit land. That he is in the process of seeking an annulment/revocation of the same on the ground of concealment of material disclosure to the Court. That the Defendant has lived in the suit property since he was born with his family therefore he

is not a trespasser. That granting the injunction would deny the Defendant access to the portion of the suit property in his possession and occupation and would be tantamount to evicting him from his home before the determination of the revocation proceedings. The Defendant urged this court to dismiss the application with costs.

5. In his replying affidavit and the submissions, the Applicant states that as the legal administrator of the estate of his father- Mwangi Muiru, the registered owner of the suit property pursuant to Succession Cause No 563 of 2014, he has capacity to institute the suit to pave way for distribution of the estate as per the certificate of the Confirmation of grant issued on 15.4.2015. That the said grant is valid and remains unrevoked. That the Defendant is not a beneficiary of the estate. Further that the Defendant has not produced any letters of representation to vouch for his legal capacity to claim under the said alleged father, Mugo Muiru. Further that the alleged judgement in SRMCC No. 78 of 1973 is incapable of execution as it does not include the Defendant nor the decree holder.

6. The Defendant in his submissions states that the application is bad in law on account of it being brought under the repealed 133(1) of the Registered Land Act and Rule (1) of unspecified Order of the Civil Procedure Rules and that the supplementary affidavit filed on 20<sup>th</sup> of April 2017 was without leave of the court therefore it ought not to be relied on by the court. That he succeeded his father's share of the land pursuant to the decision in SRMCC No. 78 of 1973. That the Applicants father held the suit land in trust for himself and his relatives.

7. The principles on which the Courts will grant an injunction are well known. The Court of Appeal in the case of **Giella v. Cassman Brown (1973) EA**, restated those principles together with the mode of their application as thus;

*“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

*a) establish a prima facie case,*

*b) demonstrate irreparable injury if a temporary injunction is not granted, and*

*c) show that the balance of convenience is in his favour.*

8. *Has the Applicant established a prima facie case? It is on record that the Applicant was appointed as the legal representative of the estate of Mwangi Muiru alias Mwangi Muriu issued on the 15.4.2015. A certificate of confirmation was granted thereon on the 10.5.16 in which the suit property was listed to be distributed to Wambui Kireru, Joseph Ndungu Kireru, Naftali Charagu Mwangi and Patrick Mugo Mwangi in equal shares. Section 79 of the Law of Succession Cap 160 provides that the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative. By virtue of the above said the Applicant has demonstrated a prima facie case on account of being the legal representative of the estate of his deceased father who was the registered owner of the land pursuant to the certificate of confirmation of grant issued on 10.5.16. It is not in dispute that the Defendant is not listed as a beneficiary of the estate and also that the beneficiaries are not listed as holding the suit property in trust for the alleged relatives.*

9. *The question of trust raised by the Respondent is a matter for the trial Court to determine and as such cannot be canvassed at the interlocutory stage. The respondent has averred that the suit land is also subject to a judgement issued in favour of Mwangi Muiru, Muchiri Muiru, Kariuki Muiru and Mugo Muiru (his father). No documents were presented to the Court for the Court to at the very least appreciate the import or otherwise of the judgement. I note that the applicant has not denied the existence of the said judgment save to say that the Respondent's claim is not tenable under the said Judgment. I leave this to the trial Court to determine.*

10. *Has the Applicant demonstrated irreparable injury if a temporary injunction is not granted? The*

applicant has stated that the land is to be distributed in line with the confirmed grant and the beneficiaries stand to lose their inheritance if the Defendant is not restrained from constructing structures on the suit land. He also deponed that he is also destroying the land thus occasioning loss and damage. The details of destruction were not expounded. In the Court of Appeal decision of **Muiruri Vs Bank of Baroda Kenya Ltd 2001 e KLR 183**, it was observed that; “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”. Besides the Defendant has not demonstrated if he is able to compensate the applicant in the event of irreparable loss or injury.

11. The Respondent submitted that he was born on the land and is in occupation. The Applicant has not controverted this fact.

12. Before I conclude I must address the issue raised by the Defendant in as far as the application is concerned. It is averred that the application should fail on account of incompetence in drafting of the same as well as the procedure in which it was brought under. Although I concur with the Defendant that the Registered Land Act has since been repealed, the application could have been drafted in a better way. Noting that the Applicant then represented himself, I will decline to so dismiss the application on that ground and instead pay fidelity to Article 159(2) (d) that justice shall be administered without undue regard to procedural technicalities.

13. In the end and fortified by Order 40 rule 1 of the Civil Procedure Rules, I am satisfied that the property in dispute is in danger of being wasted damaged if the Respondent is allowed to continue putting up structures /destruction of the said land. To preserve the suit land therefore the Court hereby orders a status quo in this matter in the following terms;

a) that the Defendant, his servants, employees, and or agents be temporarily restrained from building or putting up structures or interfering with the suit land until the hearing and determination of this suit.

b) Each party to pay their costs.

**DELIVERED, DATED AND SIGNED AT MURANG'A, THIS 9<sup>TH</sup> NOVEMBER 2017.**

**J. G. KEMEI**

**JUDGE**