



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**ENVIRONMENT AND LAND COURT DIVISION**

**CIVIL SUIT NO. 98 OF 2016**

ANDRIAN KAUMI MWARABU.....1ST PLAINTIFF

MWARABU KIRIMI NICHOLAS.....2ND PLAINTIFF

VERSUS

DENIS MWENDA.....DEFENDANT

**R U L I N G**

1. This application, stated to be predicated upon orders 40 Rules 1 and 2 and Order 51 Rule 1, is dated 13th July, 2016 and seeks Orders:-

***1. THAT this application be certified as urgent and be fixed for hearing interpartes on a priority basis.***

***2. THAT the Defendant be restrained by an order of Injunction from occupying the deceased's plot No. 57 B Kianjai Market and do deposit the accrued rent with the first Plaintiff until this suit is heard and finalized.***

***3. THAT the costs for and incidental to this application be provided for.***

2. The Application is supported by the Affidavit of MWARABU KIRIMI NICHOLAS and has the following grounds:-

***(i) THAT the Defendant was a tenant of the deceased during his life time.***

***(ii) THAT the Defendant has refused to pay rent due and vacate the demised premises.***

3. The Application is supported by the Affidavit of MWARABU KIRIMI NICHOLAS, the 2nd Plaintiff sworn on 13/07/2016. The Affidavit says:-

*“I, MWARABU KIRIMI NICHOLAS make oath and states as follows:-*

***1. THAT I am the second Plaintiff herein and swear this affidavit and on behalf of the first Plaintiff who has given me the necessary authority.***

***2. THAT my late father was the allottee of Plot No. 57B Kianjai Market (a copy of the letter of allotment is annexed and marked MKN'1').***

**3. THAT before his death, he had leased the plot to the defendant at a monthly rent of Kshs. 13,800/=.**

**4. THAT after the death of my father on 29/10/2015, the defendant refused to pay the due rent and refused to vacate the plot.**

**5. THAT the said rent currently amounted to Kshs. 238,800/= is the only livelihood for the Plaintiffs and members their family (sic).**

**6. THAT unless the Defendant pays the due rent and vacates the plot; the estate will suffer irreparable damages.**

**7. THAT I make this affidavit in support of an application annexed herein.**

**8. THAT the contents of this affidavit are true to the best of my knowledge, information and belief.**

4. The Respondent has opposed the application through his Replying Affidavit sworn on 9th August, 2016. He says in the Affidavit.

*"I, DENNIS MWENDA of P.O BOX 240 KIANJA do hereby make oath and state as follows:-*

**1. THAT I am an adult male of sound mind and the defendant/respondent herein hence competent to make and swear this affidavit.**

**2. THAT my Advocate on record has read and explained to me the contents of the Plaintiffs/applicants application dated 13th July, 2016 and the supporting affidavit sworn on 13th July, 2016 and I have duly understood their contents thereof.**

**3. THAT I am swearing this affidavit in reply and/or opposition to the Plaintiffs/applicants application dated 13/7/2016.**

**4. THAT one ROBERT MWARABU MBOROKI (deceased) the allottee of plot No. 57B Kianjai market is my father which fact the plaintiffs concealed to this Honourable Court.**

**5. THAT the 1st Plaintiff/applicant is my step-mother while the 2nd plaintiff/applicant is my step-brother and a son of the 1st plaintiff.**

**6. THAT in the year 2005 my father granted to me possession and/or occupation of his plot situated at Kianjai Market so that I could reside in the same and establish a dwelling house.**

**7. THAT after I got married in the year 2009 my father saw it fit that I vacate his other plot that I was occupying at Kianjai Market to now his plot No. 57B Kianjai Market which is spacious so that I could establish my matrimonial home which I have occupied to date uninterrupted.**

**8. THAT I have been in occupation of the material Plot No. 57 B Kianjai Market for over 7 years wherein I have resided on the same and established a general retail shop.**

**9. THAT the Plaintiff/applicant (sic) are insincere and economical with the truth alleging that my late father had leased to me Plot No. 57 B Kianjai Market and that I have outstanding rent arrears over the same.**

**10. THAT the Plaintiffs/Applicants are driven by greed and malice since the plot No. 57 B Kianjai Market belongs to our father and the 1st applicant's husband, I along with other children of the deceased rank equally in the eyes of the law over our late father (sic) property.**

**11. THAT the Plaintiff /applicants have an (sic) numerous occasions been threatening me with imminent evictions and issued me with an (sic) vacation notice dated 8/3/2016 and I also proceeded to make a reply to their notice. (Annexed and Marked DM '1a & 1b' is a copy of the demand letter and reply).**

**12. THAT the Plaintiffs/ applicants have not established a prima facie case to warrant the issuance of the orders, since they have even failed to produce any tenancy agreement, rent payment receipts if at all any to buttress their claim.**

**13. THAT I am advised by my advocate on record which advise I believe to be true that the limited Grant of Letters of Administration is not equivalent to Limited Grant of Letters of Administration ad colligenda bona vacanti which empowers one to collect the deceased property if at all any.**

**14. THAT the Plaintiffs/applicants applicant (sic) is unmerited an abuse of the Court process meant to further strain the already feeble, family relationship, and an after thought which should be dismissed with costs.**

**15. THAT if the orders sought are granted I will suffer great prejudice since I will be rendered homeless and disposed (sic) out of my birth right as a son to the deceased.**

**16. THAT what is deponed herein above is true to the best of my knowledge information and belief.**

5. The application was heard orally on 31/08/2016. Mr. Kariuki for the Plaintiffs told the Court that the Defendant was a tenant of the late Robert Mwarabu who has since the death of Robert Mwarabu refused to pay rent relating to plot No. 57B, Kianjai Market or to vacate the premises. He says that the prayers sought by the Plaintiffs are deserved as they have a right to benefit from what belonged to their father.

6. Mr. Kariuki orally asked the Court to order that a DNA test be conducted to establish the insinuated paternity of the Defendant following the claim that he was a son of the deceased ROBERT MWARABU.

7. Mr. Gichunge opposed the application. He laconically and categorically stated that the defendant was a son of Robert Mwarabu who gave him the suit plot to use it as a matrimonial home and as business premises. He told the Court that the Plaintiffs had not established a tenant /Landlord relationship between the late Robert Mwarabu and the Defendant.

8. Regarding the oral prayer by the Plaintiff's Advocates that a DNA test be conducted to definitively determine the paternity of the defendant, Mr. Gichunge pointed out that this is difficult because the deceased Robert Mwarabu is long dead and buried. Mr. Gichunge said that a paternity test using the blood or tissues of Plaintiffs and the Defendant would not be conclusive as the Plaintiffs may not be the blood children of the deceased Robert Mwarabu.

9. Mr. Gichunge termed the prayer for a DNA test as an afterthought . He termed this application as scandalous, vexatious, frivolous and an abuse of the Court Process. He asked the Court to dismiss the application with costs.

10. I have carefully considered the pleadings proffered by the parties. The issue as to whether or not the defendant is a son of the late Robert Mwarabu can not be determined at this interlocutory stage. It can only be established after the hearing of the case. The DNA test prayed for by the Plaintiff is a stranger to this application as no party has mentioned it in the pleadings.

11. Except for annexing a letter of allotment issued on 15/06/2012, no other document concerning ownership or use of the plot has been proffered. No evidence whatsoever has been tendered demonstrating a tenant/landlord relationship between the late Robert Mwarabu and the Defendant.

12. I need not reinvent the wheel. The Court of Appeal eruditely gave directions regarding how Courts should handle interlocutory application germane to injunctions. The Court of appeal in *Mbuthia Versus Jimba Credit Corporation* [1988] KLR1 opined as follows:-

***“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's propositions. The lower court judge had gone beyond his proper duties and made final findings of fact on disputed affidavits.”***

13. I do not intend to make final findings of fact on disputed affidavits and claims. I find that the relative strength of the defendant's propositions outweighs that one of the plaintiffs. He is also in possession. Should he lose the case after it has been heard, he will bear the consequences.

14. I deny the Plaintiffs their prayer for injunction and for the defendant to deposit accrued rent with the 1st Plaintiff until this suit is heard and determined.

15. The application is dismissed with costs to be in the cause.

16. The Plaintiffs are directed to fully comply with Order 11, CPR, within 30 days of today and the Defendant to do so within 30 days thereafter.

17. It is so ordered.

**DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF AUGUST, 2016 IN THE PRESENCE OF:**

CC: Lilian/Daniel

Mutunga h/b B.G Kariuki for the Plaintiffs

Gichunge for the Defendant.

**P.M. NJOROGE**

**JUDGE**