



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCC CASE NO. 62 OF 2004**

**RODA GATWIRI KIRIGIA ..... PLAINTIFF**

**VERSUS**

**KATHURIMA MAGAMBO ..... DEFENDANT**

**RULING OF THE COURT**

The application before me is the chamber summons dated 17.6.2004 brought under Order 39 Rules 1 and 2 of The Civil Procedure Rules, section 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law. In the main, the application seeks an

ORDER:-

**THAT this Honourable Court be pleased to issue an order of temporary injunction against the defendant/respondent, his agents, family members, successors in title assigns or anybody else however acting on his behalf or behest from entering encroaching and/or trespassing on the plaintiff's/applicant's, her agents, family members, successors in title or assigns, quiet user, occupation and/or enjoyment of Land Parcel No. ABOGETA/U-KIUNGONE/2651 measuring 0.40 ha. or thereabouts until this suit is heard and determined or until further orders of this court.**

The application is premised on four grounds namely:-

1. THAT the applicant is the sole registered and absolute proprietor of the said land comprised of title number ABOGETA/U-KIUNGONE/2651 measuring 0.40Ha or thereabout.
2. THAT the respondent has continued to remain in wrongful occupation of the suit land despite repeated requests by the applicant to vacate and deliver up the same.
3. THAT the applicant bought the suit land for valuable consideration and thereafter she acquired all exclusive rights and interests flowing therefrom.
4. THAT unless restrained by this Honourable court, the respondent will alienate all the applicant's land.

The application is also supported by the affidavit of RODA GATWIRI KIRIGIA, the applicant therein sworn on 17.6.2004. The applicant has deponed that she is the sole and absolute proprietor of the suit

land. She attached to her affidavit annexure "RGKI" being a copy of the Title Deed in respect of land title number ABOGETA/UKIUNGONE/ 2661 in the name of RODA GATWIRI KIRIGIA, which copy title shows that the same was issued to her on or about 1/10/2003. The applicant has further deponed that she bought the suit land for valuable consideration from one JOSEPH RIUNGU MAGAMBO who is a brother to the defendant/respondent, and that soon after the purchase, the defendant/respondent began encroaching, occupying and/or trespassing on the same and is virtually cultivating on the suit land without the applicant's permission and contrary to the applicant's wishes. At paragraph 7 of the affidavit, the applicant alleges that the defendant/respondent is a trespasser on the suit land and further that inspite of repeated requests to the defendant/respondent to vacate the land, the defendant/respondent has refused to do so, thereby necessitating these proceedings. The applicant therefore prays for an order of injunction which if not granted will result in the suit land being alienated by the defendant/respondent who has threatened and intends to remain in wrongful occupation of the suit land contrary to the applicant's rights to the said land.

In the plaint filed in court on 21.7.2004 and dated 17.6.2004, the applicant/plaintiff avers as follows in the paragraphs shown below:-

**"4. THAT in the year 2002 without any permission, reason or plausible cause the defendant wrongfully, and without any colour of right entered and/or trespassed into the aforesaid parcel of land and not withstanding repeated requests by the plaintiff to vacate and deliver up the same, the defendant has refused to heed the same.**

**5. THAT the defendant threatens and intends, unless restrained by this honourable court to continue to remain in wrongful occupation of the suit land and to trespass and cultivate thereon.**

**6. The plaintiffs claim against the defendant is for an order of eviction of the defendant from the suit land and a permanent injunction restraining the defendants by himself, his agents, family members or anybody else howsoever acting on his behalf or behest from entering, encroaching, trespassing, cultivating and/or remaining in occupation of the suit land, mesne profits plus costs and interests of the suit."**

The relief's sought are an order of eviction and permanent injunction, general damages for trespass, mesne profits from the year 2002 todate, costs and interest.

The applicant's application is opposed. In an undated replying affidavit sworn by Kathurima Magambo and duly filed in court on 6.7.2004, the respondent has deponed that land parcel No. 2650 shown in the annexure marked "RGK2" belongs to him and that both that parcel of his and that of the applicant were once part of parcel number ABOGETA/U-KIUNGONE/382 originally owned by the respondent's father, one MAGAMBO M'NGITI. That 25 coffee trees, 177 tea bushes and 5 grivella trees which were planted by the respondent ended up on the portion of land known as ABOGETA/UKIUNGONE/ 2651 which then belonged to the respondent's brother, one JOSEPH RIUNGU MAGAMBO and which parcel was later sold to the applicant who had agreed to compensate the respondent for the trees but which she has not done todate. Further, the respondent has deponed that he has never intended to trespass on the applicant's land and that the reason why the applicant has brought the matter to court is to find a way of avoiding compensating the respondent for the trees and the tea bushes. Finally the deponent has alleged at paragraph 13 of the replying affidavit that, the applicant has filed these proceedings in bad faith and further that the applicant does not ever seem to know what her real claim against the respondent is. In his submissions to the court, Mr. Riungu for the respondent urged the court to dismiss the application since the applicant has not satisfied all the conditions for the granting of an injunction at set out in the case of GIELLA V. CASSMAN BROWN. Mr. Riungu also submitted that if indeed the

respondent is in occupation of the applicant's land, then the order for an injunction against the respondent cannot be given as a party cannot be enjoined from doing that which has already taken place.

The issue for determination is whether the applicant has satisfied the principles for the granting of the injunction that she seeks. Section 63 of the Civil Procedure Act provides that in order to prevent the ends of justice from being defeated, the court may, if it is so prescribed "(e) make such other interlocutory orders as may appear to the court to be just and convenient. Order 39 Rule 1 provides:-

**"1. Where in any suit it is proved by affidavit or otherwise-**

**(a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or**

**(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit;**

**The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit or until the disposal of the suit or until further orders."**

It is clear therefore that the remedy sought is an equitable remedy. In the case of *GIELLA V. CASSMAN BROWN & CO. LTD* (1973) EA 358, SPRY V-P at page 360 stated the following as the conditions upon which a court can grant an order for injunction:-

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

In effect therefore, the applicant in this case must not only show that she has a prima facie case with a probability of success, she must also show that unless the order sought is granted, she might suffer irreparable injury which would not be adequately compensated by an award of damages. I have already referred to the relevant paragraphs 4, 5 and 6 of the plaint in which the plaintiff/applicant has averred that in the year 2002, the defendant wrongfully and without any permission, reason or plausible cause entered the plaintiff's land and trespassed thereon. At paragraph 5 of the plaint, the plaintiff/applicant avers that the defendant/respondent threatens and or intends to remain in wrongful occupation of the suit land and at paragraph 6, the plaintiff/applicant seeks an order of injunction to restrain the defendant/respondent from entering, encroaching..... occupation of the suit land plus costs and interest. From the plaint, and especially paragraph 4 thereof, the plaintiff/applicant alleges that the defendant/respondent entered the suit land in the year 2002 and yet from the annexure marked "RGKI". The applicant did not become the registered owner of the suit land before 1st October, 2003. The respondent could not have trespassed on what did not belong to the applicant. The ground upon which the plaintiff's/applicant's case would otherwise have rested is thus removed by these glaring discrepancies in the plaintiff's/applicant's pleadings. In his reply to Mr. Riungu's submission on this point, Mr. Mwanzia for the applicant did not address the issue, thus leaving the issue raised by the respondent unchallenged. Further, in his reply, Mr. Mwanzia submitted that the respondent is encroaching upon the plaintiff's/applicant's land. It becomes evident that the plaintiff/applicant is indeed

not sure whether the respondent has entered her land or is only now encroaching on the applicant's land. According to Blacks Law Dictionary 7th Edition, the word "enter" is defined as,

**"to come or go into especially to go onto (real property), while the word "encroach" is defined as "to enter by gradual steps or stealth into the possession or rights of another, to trespass or intrude into another's land."**

My reading of the pleadings is that at paragraph 4 of the plaint, the plaintiff/applicant is categorical that the respondent has indeed entered the applicant's land and yet at paragraph of 6 of the plaint, the applicant seeks an order to injunct the respondent from entering the applicant's land. Such pleadings in my view, do not show that the plaintiff/applicant has a prima facie case with a probability of success. Further, the plaintiff/applicant has not shown that she will suffer irreparable injury which cannot be adequately compensated by an award of damages if the injunction is not granted. If the complaint is one of trespass, the applicant can easily quantify the loss, if any, that would be incurred by such an act on the part of the respondent.

All in all, the plaintiff/applicant has not satisfied the conditions set out in the case of *GIELLA V. CASSMAN BROWN & CO. LTD* (supra) for granting of orders of injunction and is therefore in my view not entitled to the reliefs sought. Accordingly the applicant's application dated 17.6.2004 is dismissed with costs to the defendant/respondent.

It is so ordered.

Dated and delivered at Meru this 20th day of December 2004.

**RUTH N. SITATI**

**Ag JUDGE**

**20.12.2004**



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