

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO: 2351 OF 2011

IN THE MATTER OF THE ESTATE OF NDUNGU MWANIKI – (DECEASED)

RULING

1. The applicants in the Summons for Revocation application dated 28th October 2011 have moved the court by a summons dated 10th June 2013 for injunctive orders to restrain the respondent from preventing or denying the applicants from using or utilizing the suit premises, especially stopping them from pricking tea and cultivating on parcel number Ndarugu/Karatu/435 pending the hearing and determination of the summons dated 28th October 2011.
2. The application dated 10th June 2013 is premised on the affidavits of Miriam Wanjiru, Mercy Muthoni and Peter Muiruri Ndungu all sworn on 30th May 2013. Miriam Wanjiru pleads that she is the widow of the deceased and the mother of the other applicants and the respondent. She avers that the summons dated 28th October 2011 is pending, yet the applicant threatens to demolish houses of some of the applicants with a view to evict all of them from the suit premises. She pleads that the family was born and brought up in the subject land which she describes as family land. Mary Muthoni is the widow of the first applicant. She supports the application. The affidavit by Peter Muiruri Ndungu is word for word that of Miriam Wanjiru.
3. Upon being served, the respondent swore an affidavit on 27th August 2013 and filed it in court on 28th August 2013. He pleads that the summons dated 28th October 2011 is a duplication of Nairobi High Court Civil Suit No. 995 of 2010, where B.A. Owino J ordered the applicant to move out of Ndarugu/Karatu/435. He refers too to an appeal that the first applicant has lodged against the judgment pronounced in **HCCC No. 994 of 2010**. He says that there are stay orders in **HCCC No. 994 of 2010**.
4. On 23rd September 2013 directions were given that the application dated 10th June 2013 be disposed of way of written submissions. Both sides have filed their written submissions. Those by the applicants are dated 8th October 2013 and were filed on 10th October 2013. The respondent's submissions are dated 25th September 2013 and were filed in court on the same date.
5. The applicants case is that the summons dated 28th October 2011 is not a duplication of **Thika CMCC No. 994 of 2010**, given that the **Thika CMCC No. 994 of 2010** involved 1st the applicant – John Mwaniki Ndungu, while the application 28th October 2011 is brought at the instance of three individuals. The issue of *res judicata* does not in his view, therefore apply. They also say that the respondent swore affidavits to support the petition and the confirmation application where he alleged that he was the only person who survived the deceased. He also argues that the title the subject of these proceedings was procured fraudulently. He refers *Giella –vs- Cassman Brown & Company Ltd* (1973) EA 358.
6. The respondent's main contention is that the application does not meet the threshold for grant of injunctive relief. He asserts that there was material non-disclosure and that the application offends the equitable doctrines for grant of injunctive relief. He refers to **Thika CMCC NO. 995 of 2010** and Nairobi **HCCA No. 411 of 2011** to buttress his case that the matter is *res judicata*. He accuses the applicants of non-disclosure - they did not disclose existence of **Thika CMCC No. 994 of 2004** and Nairobi **HCCA No. 411 of 2011**. He cites authorities where the courts have held that on an *ex parte* application for an order the applicant is bound to state all material facts. It is also argued that the application is incompetent as the 1st applicant died before it was filed, while the 3rd applicant did not support it. The effect of this would be that the application is supported by affidavits of persons who are not applicants in the application dated 28th October 2011. It is said that the 3rd applicant has filed two affidavits, one supporting the application, and the other

- disowning it.
7. I have carefully gone through the material placed before me with respect to the application dated 10th June 2013. I have noted that the 1st applicant - John Kamau Ndungu - is dead. He has not been substituted. I have noted that the 2nd applicant, Jackson Mwaniki, has not sworn an affidavit to support the application. That leaves us with the 3rd applicant, who has sworn a supporting affidavit. There are two other supporting affidavits by persons who are not applicants to the application dated 25th October 2011 and who describe themselves as beneficiaries of the estate. The respondent says that the 3rd applicant to the application dated 28th October 2011 swore an affidavit on 28th September 2013 to support his opposition to the application dated 10th June 2013. The said affidavit is not in the record before me. I will assume therefore that the only affidavit by the 3rd applicant is that dated 30th May 2013, which is supportive of the application. Consequently, it is my finding that the application dated 10th June 2013 is valid and competent as it is brought at the instance of one of the applicants in the mother application dated 28th October 2011.
 8. The next issue for consideration is whether the application before me reaches the threshold for grant of injunctive orders. The principles were clearly laid out in *Giella –vs – Cassman Brown & Company Ltd*. The applicant is aware of this –she has cited this decision in her written submissions. The applicant must establish that a *prima facie* with probability of success exists, that the damages sufferable by the applicant should the order for injunction not be granted would be irreparable and, in absence of the above, the court should considered balance of convenience. In addition, there is the position stated by Scrutton LJ in *King-vs- General Commissioner for Income Tax* (1917) 1 KB 486, that a party applying *ex parte* must state the whole case fully and fairly to the court. Failure to do so dislutiltes the party to the orders sought. This was cited with approval in *Mountain View Properties Ltd & Another –vs–Access Holdings Ltd & Another HCCC No. 385 of 2004*.
 9. I have looked at the affidavits filed in support of the application dated 10th June 2013 by Miriam Wanjiru, Mercy Muthoni and Peter Muriu Ndungu. Out of three only one merits consideration – that by Mirima Wanjiru by dint of her being an applicant in the mother application dated 28th October 2011. The other two are not worth looking at all. They are filed by parties who have no locus in the matter at hand, as they are not party to the application dated 28th October 2011, which originates this cause – Nairobi HCSC No. 2351 of 2011. They have no standing to swear affidavits of the nature of those dated 30th May 2013. The only valid affidavit, by Miriam Wanjiru, of 30th May 2013 is bare. It does not disclose the whole case for revocation of the grant and it does not give a fair amount of facts upon which this court can make a determination one way or the other. She merely depones that there is a pending annulment application, that the land in question is family land and that there are threats to evict the applicants from the land. No relevant documents have been annexed to the affidavits, documents that would have helped to bring the matter within the threshold in *Giella –vs- Cassman Brown*. Indeed, the respondent has done a better job of disclosing relevant and material facts of the nature that ought to have been disclosed by the applicant. Quite clearly, no effort has been made through the affidavits to demonstrate that there is a *prima facie* will probability of success nor that if the orders are not granted the applicants would suffer irreparable loss nor that the balance of probability tilts in favour of the applicant. The material disclosed in the affidavit of Miriam Wanjiru is insufficient to convince me to make the orders that she seeks in the application.
 10. A faint effort was made through the applicant’s written submissions dated 8th October 2013 to ameliorate the position. There is here allusion to the suit title being obtained fraudulently, that the respondent obtained the grant after stating that he was the sole survivor of the deceased and that the Chief’s letter had given full details of the survivors. Annexed to the submissions are documents drawn from Thika **CMC P & A No. 222 of 1986**. This does not in any way help the case of the applicant. Written submissions should not be used to introduce new facts. Indeed, written submissions ought to dwell only on points of law. The applicant’s written submissions have not dwelt on the law at all, instead they seek to analyse facts which are not deponed to in the affidavits supporting the application. Moreover, the said written submissions have annexures of documents

which are meant to bring out certain facts. Annexing evidence to written submissions is unprocedural. Evidence is brought out through affidavits and where there is documentary proof the same is placed before the court in the form of an annexure to the affidavit. An affidavit is a sworn statement and the annexure must be referred to in the statement and must be appropriately marked. Written submissions are not in the same as affidavits. They are not sworn statements. They are not even meant to deal with facts but the law. It is therefore abuse of procedure to attach evidence to written submissions.

11. It is my finding that the application dated 10th June 2013 is not supported by evidence of facts that would merit its being granted. It is hereby dismissed. The respondent shall have costs of the same.
12. The applicant should be moving to have her revocation application heard and disposed of expeditiously, instead of filing weak interlocutory applications which serve only to delay the hearing of the mother application. I hereby order the applicant to have the application dated 28th October 2011 fixed for hearing in the next forty-five days of this ruling, failing which the said application shall stand revoked.

This matter shall be mentioned on a date to be given in court at the delivery of this ruling. The mention date shall be for the purpose of monitoring compliance.

DATED, SIGNED and DELIVERED at NAIROBI this 21ST DAY OF MARCH, 2014.

W. MUSYOKA

JUDGE