



MILKA NYAMBURA WANDERI.....1ST PLAINTIFF

ALICE WAITHERA MWANGI.....2ND PLAINTIFF

Versus

REV. DAVID WAWERU NJOROGE.....1ST DEFENDANT

PROF. MWANGI KAGWANJA.....2ND DEFENDANT

CHARLES KARAGU KAMAU.....3RD DEFENDANT

RULING

Milka Nyambura Wanderi and Alice Waithera, being the 1st and 2nd plaintiffs herein, took out the motion dated 24th February 2012 in which they sought for the following orders:-

- 1. That this application be certified urgent and for reasons to be recorded in court service in the 1st instant be dispensed with.***
- 2. Pending the hearing of this application interpartes, or until further orders, a temporary order of injunction do issue restraining the 2nd defendant, his servants, agents, assigns or any persons whatsoever acting on its behalf, their employees and associates, or any agents acting on their instructions from trespassing into, cutting down or destroying tea plantations and trees, destruction of property, entering into or interfering with or in any manner whatsoever preventing the plaintiffs from entering into or interfering with or in any manner whatsoever preventing the plaintiffs from entering into, accessing or generally having quiet enjoyment of the suit property known as LOCATION 19/RWATHIA/487 situate in Muranga County or attempting to alienate or dispose of it to a 3rd party.***
- 3. Pending the hearing of the main suit or until further orders a temporarily order of injunction does issue restraining the 2nd defendant, his servants, agents, assigns or any person whatsoever acting on its behalf, their employees and associates, or any agents acting on their instructions from trespassing into, cutting down or destroying tea plantations and trees, destruction of property, entering into or interfering with or in any manner whatsoever preventing the plaintiffs from entering into, accessing or generally having quiet enjoyment of the suit property known as LOCATION 19/RWATHIA/487 situate in Muranga County or attempting to alienate of dispose of it to a 3rd party.***
- 4. The order of this court be effected and enforced through the local district administration and chief Rwathia Division, Kangema District.***
- 5. Leave be granted to the plaintiffs to commence contempt proceedings against the 2nd defendant Prof. PETER MWANGI KAGWANJA.***
- 6. Cost of this application be awarded to the plaintiff/applicant.***

The motion is supported by the affidavit and supplementary affidavit sworn by Milka Nyambura Wanderi. When served with the aforementioned application, Rev. David Waweru Njoroge, Prof Peter Mwangi Kagwanja and Charles Karagu Kamau, Monica Kanyina alias Dr. Monica Kathina Juma, being the 1st, 2nd and 3rd Defendants respectively filed the affidavit of Prof. Peter Mwangi Kagwanja to oppose the motion. When the motion came up for interpartes hearing, it turned out that the main question in contention is **“what is the status quo to be maintained pending the hearing and determination of the originating summons dated 4th October 2010?”**

Learned counsels appearing in the matter were invited to make submissions to guide this court in making a decision to define the status quo to be maintained before the aforesaid originating summons is heard and determined.

I have considered the oral submissions made by the learned counsel from both sides. I have also taken into account the grounds set out on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. The substantive matter in this case is the further amended originating summons dated 8th July 2011 taken out by the plaintiffs in which they have beseeched this court to issue the following orders;-

- 1. The 1st defendant, being the registered owner of that parcel of land known as LOCATION 19/RWATHIA/487 be registered as trustee and/or declared to have held the said parcel in trust for the plaintiff/applicants herein.**
- 2. That the plaintiffs/applicants be declared and registered as the proprietors of 1.03 hectares of land or portion thereof of the land know as LOCATION 19/RWATHIA/487.**

In the alternative the 1st defendant’s title to 1.03 hectares or the portion of land measuring 2.06 hectares of the parcel of land known as LOCATION 19/RWATHIA/487 be deemed to have been extinguished through adverse possession of Grace Wanjiku Njoroge (deceased) the 1st and 2nd plaintiffs and who are the legal representatives or administratrix of their deceased mother’s estate GRACE WANJIKU NJOROGE.

2A. An Order does issue for the cancellation of the transfer and title issued in the name of the 2nd defendant/respondent Prof Peter Mwangi Kagwanja on the 8th March, 2011 and for rectification of the Register to the position or status as at the 7th March, 2011 subject to an order for a declaration of trust as prayed in prayer 2 above.

- 3. The plaintiffs be awarded costs of the suit and damages.**

Rev. David Waweru Njoroge, the 1st defendant herein has filed a comprehensive replying affidavit to resist the originating summons. The dispute is yet to be heard.

It is the submission of Mr. Oluoch, learned advocate for the plaintiffs that since the plaintiffs are claiming to be entitled to half of the parcel of land known as LOC 19/RWATHIA/487, hence that portion should be protected and preserved. The aforesaid parcel of land measures approximately 2.06 hectares. This means that the plaintiffs are claiming a portion measuring 1.03 hectares. The plaintiffs are stating that their portion should encompass the grave of their deceased mother and the house she used to reside on. The plaintiffs further proposed that the 1st defendant should have unrestricted access to the other half and that the title which is currently in the joint names of 2nd and 3rd defendants be retained as such until the dispute is heard and determined.

Mr. Kihara, the defendants’ learned advocate was of a different view. The defendants’ advocate was of the view that the plaintiffs claim clearly shows that they have been utilizing a portion equivalent to 1/6 of the aforesaid parcel of land hence that should be the only portion which should be preserved. The defendants have further argued that the grave where the body of the plaintiffs’ mother was interred is in a

different portion of the land.

It is their submission that since the parties are close relatives they are all bound to protect that grave. The defendants have averred that the grave and the house where the deceased used to reside have always been taken care of by the 1st defendant.

The defendants undertook to allow the plaintiffs to continue picking tea from the portion they have been doing so for years. In short, Mr. Kihara proposed that the status quo which should be preserved is to allow the plaintiffs to continue picking or tendering tea in 1/6 of the suit parcel of land.

After a careful consideration of the rival submissions, it is now clear that Milka Nyambura Wanderi and Alice Waithera Mwangi the 1st and 2nd Plaintiffs are utilizing a portion of the land by tendering and picking tea. This fact is admitted in the oral submissions of both learned counsels. The only issue which is in contention is the size of the portion the plaintiffs are utilizing. The defendants aver that the plaintiffs are utilizing 1/6 of the suit land while the plaintiffs claim they are utilizing ½ of the land. In paragraph 17 of the replying affidavit of Rev. David Waweru Njoroge sworn on 13th October 2010, the 1st defendant has deponed that he has on several occasions allowed the plaintiffs to use the coffee and the tea bushes on the land.

In his oral submissions, Mr. Kihara learned advocate for the defendants stated that his clients had informed him that there were no coffee trees on the suit land. He basically contradicted the sworn affidavit evidence of his client. The 1st defendant further averred in paragraph 22 of his replying affidavit that the plaintiffs' mother lived in a house he had put up himself.

In paragraph 19 of the same affidavit, the 1st defendant avers that he buried the body of the plaintiffs' mother in the suit parcel of land. This averment is contradicted by the oral submissions of Mr. Kihara who stated that the deceased was buried elsewhere.

In my assessment of the evidence, I am convinced that plaintiffs have been consistent and truthful in their submissions. With respect, I will go with the submissions of Mr. Oluoch learned advocate for the plaintiffs. Consequently the definition of the **status quo** to be maintained should be as follows:-

- 1. The portion occupied and utilized by the plaintiffs should encompass the house where the late Grace Wanjiku Njoroge used to live and the grave where she was buried. The plaintiff should not be hindered from continuing to utilize and occupy the aforesaid portion which is equivalent to half the parcel of land in dispute until the further amended originating summons is heard and determined.***
- 2. The 1st defendant should have unrestricted access to the other half of the land but should not interfere with that utilized by the plaintiffs.***
- 3. The title deeds now in the joint names of the 2nd and 3rd defendants should remain with them and as such until this matter is heard and determined.***

In the final analysis the motion dated 24.2.2012 is settled as proposed hereinabove. The further amended originating summons to be fixed for hearing on priority basis after the parties have complied with the preliminary procedures.

Costs of the motion shall abide the outcome of the summons.

Dated and delivered this 2nd Day of August 2012

**J. K. SERGON
JUDGE**

In open court in the presence of Mr. Waruingi holding brief Oluoch for Plaintiff/Applicant.

G. Mwangi holding brief C. N. Kihara for the Defendant.