



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 317 of 2012**

**HARRIS KAMITI KIHARA.....PLAINTIFF**

**VERSUS**

**JOHN GACHOKA KIHARA.....1<sup>ST</sup> DEFENDANT**

**JOSPHAT GATHOGA.....2<sup>ND</sup> DEFENDANT**

**DAVID MBURU.....3<sup>RD</sup> DEFENDANT**

**SAMUEL KAMAU GATHOGA.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff/applicant hereinafter referred to as the applicant has filed Notice of motion dated 5/6/2012, under order 40 Rules 1,2, 3 and 10 (i) (a) of the Civil Procedure Rules Sections 1A, 1B and 3A of the Civil Procedure Act, and all enabling provisions of the law seeking the following orders;

i. Spent.

ii. That this honourable court be pleased to issue orders of injunction restraining the defendants by themselves, their servants, agents, assignees or any persons claiming through the defendants or any of them from using, developing on or constructing on, trespassing on, entering upon, or in any manner whatsoever dealing or interfering with the plaintiffs possession of the suit property being a portion measuring 5 acres out of LR No. Githunguri/Githiga/1121 pending the hearing and determination of this application or until further orders of this Honourable Court.

iii. That this honourable court be pleased to issue orders of injunction restraining the defendants by themselves, their servants, agents, assignees or any persons claiming through the defendants or any of them from using, developing on or constructing on, trespassing on, entering upon, or in any manner whatsoever dealing or interfering with the plaintiffs possession of the suit property being a portion measuring 5 acres out of LR No. Githunguri/Githiga/1121 pending the hearing and determination of this suit.

iv. That the costs of this application be provided for.

2. The application is based on the following grounds;

i. The subject property by the plaintiff herein beneficially who entered the same and

who has been in continuous, uninterrupted and quiet possession of the suit property having been given the same by his father the late Peter Gathoga Kihara.

ii. The plaintiff had extensively developed the suit premises.

iii. Damages would not be an adequate remedy, as the property will unless preserved by injunction be subject to alienation and this suit rendered nugatory. If the defendants are not restrained by injunction from proceeding with their illegal trespass over the property there is a very near likelihood of loss of life as the defendants have not undertaken any due legal process to warrant their actions which are illegal yet they are forcing themselves into the suit property using machetes and other weapons.

iv. Other reasons shall be offered at the hearing of this motion.

3. The plaintiff filed a supporting affidavit dated 5<sup>th</sup> of June 2012 and a supplementary affidavit dated 27 of June 2012. He avers as follows in the affidavits; that his late father had 3 parcels of land, Githunguri/Githiga/1119 measuring 5 acres, Githunguri/Githiga/1120 measuring 5 acres and Githunguri/Githiga 1121 measuring 20 acres is the subject matter of this suit. The two parcels of land were registered in his name until parcel No. 1121 was transferred to Esther Wangari after the judgment in HCCC No. 3859 of 1979. In the said case Esther Wangari Kihara had claimed a portion of his father's land. That his father died before the suit was heard but he was substituted with the administrators of his estate. An appeal was filed against the said judgment vide C. A No. 172 of 2011 which is still pending before the Court of appeal. That he was not a party to HCCC No. 3859 of 1979 and neither were the defendants. That during his lifetime his father had given each of his sons their portions of land and on his part he had been given a portion measuring about 5 acres out of the L.R. No. Githunguri/Githiga/1121. He has developed the said portion of land by building a permanent house, planting tea, rearing dairy cattle, growing napier grass and other staple food. This was the status in which he stayed on the land even before his father died and even after his death. That in August 2011 Esther Wangari Kihara died and a dispute over her burial place arose. He was not a party in that suit but he knows that the court ruled that she was to be buried on the portion of land that previously was part of the suit property in HCCC No. 3859 of 1979. That in April 2012 after the burial of Esther Wangari the four defendants trespassed into the portion of the land which he occupies and proceeded to relocate a house that they transferred from another parcel of land, the house is movable, cut down his napier grass, started picking his tea crop, hawking the same, sprayed the grass which his cattle feed on with round up with the intention of drying it up and his cows cannot now graze on the grass. They also cut down trees which they used build cattle sheds on his land and engaged in violent acts by using violence, threatening him and his employees in the land. That the deceased original parcel of land has never been subdivided and whereas there is a title is now into the name of Esther Wangari Kihara after the judgment, he is not aware of any subdivision of the land and how it was undertaken. It is also his contention that no such subdivisions could be undertaken without regard to his existing rights on the parcel of land that he occupies. That the defendants have also not been appointed as administrators of the estate of Esther Wangari Kihara and he does not know in what capacity they are trespassing into his land. That for the defendants to enter into his land they are obliged to follow legal process and they cannot forcefully and unlawfully enter into his land or unilaterally decide to invade his portion as the judgment which awarded the deceased Esther Wangari land did not even specify from what part of his later father's land her portion was to be excised. That the said Esther Wangari did not live or occupy the portion that he occupies or even any portion of his father's land as she lived elsewhere during her lifetime. The land on which his portion is to be found was at all times occupied and utilized by himself, Peter Gathoga Kihara and Leah Wanjiru Kihara together with their families. That the continued trespass and illegal acts of the defendants into his portion of land is unlawful and will cause irreparable loss and damage particularly as it is life threatening and the use of machetes can lead to loss of life. That it has caused tension and stress to his family as they cannot now live a peaceful life. That in the circumstances, it is only fair and just that the defendants be restrained from continuing with their illegal acts pending the hearing and determination of this suit.

4. In his supplementary affidavit the applicant avers that he did not participate in the proceedings in HCCC No. 3859 of 1979, he was not a party to that suit and that is why he filed the application for joinder dated 22<sup>nd</sup> February 2006 and the application has never been heard nor the orders that he had

sought therein were never granted. That he could not protect his interest in the said suit as he was never enjoined to the same. That the application filed in HCCC No. 3859 of 1979 seeking stay of execution has nothing to do with his interest at personal level. He has not filed the said application and it therefore does not stop him from proceeding to protect his interests as he has opted to do in this suit and that the suit is not res judicata.

5. Mr. Samuel Kamau Gathoga the 4<sup>th</sup> defendant filed a replying affidavit dated 18/6/2012. He avers as follows; that parcel No. Githunguri/Githiga/1121 registered in the name of the late Esther Wangari Kihara measures 10.75 acres and not 20 acres as alleged by the plaintiff, that the plaintiff was aware of existence of Civil case HCCC No. 3859 of 1979 instituted by the late Esther Wangari Kihara and at all material times the plaintiff actively participated in the proceedings and/or was litigating through the administrators of the estate of the deceased Peter Kihara. That on 22<sup>nd</sup> February 2006 the plaintiff applied to be enjoined as a party in HCCC 3859 of 1979 on the ground that the administrators of the estate of his late father were not suited to protect and/or represent his interest in the said suit contrary to his allegations in his affidavit, that he was not a party to the suit and did not participate in it. That the plaintiff was always present during the hearing of HCCC 3859 of 1979, Githunguri PMCC No.70 of 2011 and HCCA 430 of 2011 and even took part in partial negotiations in HCCC No. 3859 of 1979 contrary to his allegation that he did not participate in the proceedings. That if the plaintiff wanted to protect his interests as he alleges now, he ought to have channeled his grievance through HCCC 3859 of 1979 and not through a separate suit. That the plaintiff knew or ought to have known that the outcome in the said suit was going to affect him as the Court had already placed a prohibition on parcel No. Githunguri/Githiga/1121 way back in 1980. That the plaintiff's interest and that of the beneficiaries of the estate of the late Peter Kihara Gathoga have been taken care of by the defendants' application for stay of execution in HCCC No. 3859 of 1979. That it is not true that the plaintiff's deceased father allowed him to put up structures or cultivate on parcel No. Githunguri/Githiga/1121 but the plaintiff has forcefully entered the suit land and constructed his structures. That the plaintiff does not own parcel No. Githunguri/Githiga/1121 but is only engaged in forcefully detainer of the deceased's parcel of land. That the deceased Esther Wangari Kihara in HCCC No.3859 of 1979 was awarded the whole parcel No. Githunguri/Githiga/1121 which had already been excised and there was no further subdivision to be undertaken as alleged by the plaintiff. That they have not threatened the plaintiff and/or damaged any trees or crops as alleged by the plaintiff. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not encroached on land belonging to the beneficiaries of the late Peter Kihara Gathoga and/or the plaintiff. Their activities are confined to parcel No. Githunguri/Githiga /1121. That the Judgment in HCCC No. 3859 of 1979 has been executed and the plaintiff is trying to secure stay orders through this suit. That the orders sought by the plaintiff if granted will greatly prejudice the defendants and the dependants of the estate of the deceased as it will amount to evicting them from the suit land. That the deceased Esther Wangari Kihara and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have always resided on the said parcel of land contrary to the plaintiff's allegations. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the dependents of the late Esther Wangari Kihara and though they have not been appointed as legal representatives of the estate, they do represent her interest. That the plaintiff has continued to put up structures on the said parcel even after the delivery and execution of the judgment.

6. I have considered the affidavits filed by the parties and the oral submissions made by counsels. The issue is whether the plaintiff is entitled to the injunction sought. As I have considered this application the following facts have come to light; the plaintiff's father was sued by Esther Wangari Kihara whom the defendants' claim they are her defendants' in HCCC 3859 of 1979. Esther Kihara was awarded the parcel of land which is subject of this suit and thereafter the administrators of the applicant's father's estate filed an appeal CA 172 of 2011 which is still pending. The applicant claims that he was not a party to the said suit although the suit land of which he claims 5 acres was a subject of the said High Court suit. It is apparent that the administrators of that suit proceeded on behalf of the applicant's father. I have not had the benefit of reading the said judgment but from what is averred the administrators of the applicant's father estate went ahead to continue with the suit when their father died. The applicant's claim that he was not a party to that suit cannot stand as his rights were taken care of when the administrators of his father's estate enjoined themselves in the suit and have even appealed. I agree with the respondent's counsel that the applicant ought to have pursued his interest in HCCC No. 3859 of 1979 over the 5 acres which he claims as a subject of this application. It is evident that there is an appeal in the Court of Appeal which

the applicant and the administrators of his father's estate should pursue as regards their rights in the suit property. Granting the orders as sought would in my view would not be appropriate in the circumstances as the applicant should pursue his interests in the Court of Appeal case. I therefore find that the applicant has failed to establish a prima facie case with a probability of success. I note that he claims he will suffer irreparable loss and damage; he should pursue the same in the Court of Appeal case. The balance of convenience does not tilt in his favour in light of the facts that have been brought to this Court's attention from the proceedings in HCCC No.3859 of 1979. The applicant has filed a fresh suit instead of pursuing his rights in the appeal case. I find no merit in this application. The two families should pursue the appeal. Bearing in mind the circumstances of this case costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this day of 7th November 2012

**R. OUGO**  
**JUDGE**

.....for the Plaintiff/Applicant

.....for the Defendants/Respondents

.....Court Clerk