



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 119 OF 2005**

**IN THE MATTER OF THE ESTATE OF NGARI KAGURUKIA  
DECEASED**

**MARGARET KIRIGO MWAI .....APPLICANT**

**VERSUS**

**NYAWIRA NGARI .....RESPONDENT**

**RULING**

The subject matter of this ruling is the Summons General dated 8<sup>th</sup> November 2010 in which Margaret Kirigo Mwai, the applicant herein has applied for the following orders:

1. *That this application be heard exparte in the first instance due to its urgency*
2. *That the honourable court be pleased to restrain the respondents, their agents, servants or any person claiming interest under them from interfering with the applicants' use and/or occupation of part of the land L.R. no. Magutu/Gaikuyu/750 and in particular picking her tea bushed.*
3. *That the honourable court be pleased to order the respondents to maintain status quo as at 1<sup>st</sup> November 2010.*
4. *That costs of this application be provided for.*

The applicant has filed two affidavits she swore in support of the application. Pauline Nyawira Ngari, the Respondent herein, filed a replying affidavit to oppose the application.

The substantive matter in this dispute which is pending for hearing and determination is the summons for confirmation of grant dated 15<sup>th</sup> July 2008 filed by the applicant herein and the affidavit of protest filed by Nyawira Ngari. In the intervening period while the aforesaid dispute was pending for hearing, Paul Muriuki Ngari, successfully applied to be appointed as a guardian ad litem for Nyawira Ngari due to her advanced age and medical condition. Paul Muriuki Ngari was consequently substituted in place of Nyawira Ngari. It is also important to note at this stage that the temporary grant was originally issued to Nyawira Ngari in respect of the estate of Ngari Kagurukia, deceased. Margaret Kirigo Mwai applied for the same to be revoked for various reasons. Lady Justice Kasango heard the application and ordered for the grant to be revoked. She contemporaneously made an order which was to the effect that a fresh temporary grant be issued in the joint names of Pauline Nyawira Ngari and Margaret Kirigo Mwai. That is the grant the applicant now wants to be confirmed but Nyawira Ngari has filed a protest.

Having given the brief background of the history leading to the filing of the current summons, let me now turn my attention to the matter before me. The applicant avers that both the applicant and the respondent occupy and utilize their respective portions within the parcel of land known as L.R. no. Magutu/Gaikuyu/750. It is alleged that on 1<sup>st</sup> November 2010 Paul Muriuki Ngari a son of Pauline Nyawira Ngari with some workers went into the portion the applicant has tea bushes where they began plucking the said tea. The applicant is of the view that the respondent and her son have no justification at all in interfering with her peaceful occupation and use of her portion of the land. She has now come to beseech this court to issue an order to restrain the Respondent. She also alleged that Paul Muriuki Ngari came to the land while armed with pangas. The applicant stated that she reported the incident to the local Provincial Administration but Paul Muriuki Ngari was undeterred by their pleas.

I have perused the letter dated 9<sup>th</sup> November 2010 written by Mohamed Barre, District Commissioner, Mathira East, to the Chief Magutu Location. The same indicates that the applicant is in occupation of the land in dispute and that she picks tea. On his part, Paul Muriuki Ngari, deponed in his replying affidavit that the tea he is accused to have plucked belonged to his late father and mother. He claimed the same were planted in 1985. He alleged that the applicant who is a wife of Watson Mwai, a cousin to his father does not live on the land but lives in L.R. no.

Magutu/Gaikuyu/748 while he lives with the respondent on the land in dispute i.e. L.R. no. Magutu/Gaikuyu/750. He claimed that the applicant has never had tea in the suit land. Paul Muriuki Ngari complained that the applicant is known to use the Provincial Administration to harass them. He attached to his replying affidavit a copy of the letter written by Mr. F.C. Komen, D.C. Nyeri North dated 16<sup>th</sup> January 2008. In the aforesaid letter the D.C. stated that the Respondent and her son had gone to complain that the applicant had influenced the area chief and his assistant to aide her to pick tea from the suit land. The respondent further alleged that the applicant has always ensured that the respondent and son have been harassed. He attached to the replying affidavit a copy of a judgment in respect of a criminal case which was preferred against him on the basis of a complaint lodged by the applicant. I have looked at the copy of the judgment annexed to the replying affidavit. It would appear the applicant herein had complained against Paul Muriuki Ngari, who was subsequently charged with the offence of malicious damage to property. It was alleged that he willfully and unlawfully damaged 76 tea bushes. The accused was acquitted on the basis that the prosecution had not shown the portion of land where the tea bushes were cultivated. The court was unable to state whether the damaged tea bushes were in L.R. no. Magutu/Gaikuyu/338 or in L.R. no. Magutu/Gaikuyu/750. The applicant clarified the allegations made by the respondent. She alleged that the tea, the respondent has purported to harvest is in L.R. no. Magutu/Gaikuyu/780 being a subdivision of L.R. no. Magutu/Gaikuyu/750. The aforesaid parcel of land is said to have been registered in the name of Ngari Kagurukia, the respondent's father in trust for himself and Watson Mwai Kagurukia, the applicant's husband. The applicant admitted that she lives in L.R. no. Magutu/Gaikuyu/748 but she states that her husband's share is in L.R. no. Magutu/Gaikuyu/750 where her tea bushes are and which tea bushes she has been pruning since 1975.

After a careful consideration of the accusations and the counter-accusations traded by the parties, there is no doubt that the respondent attached to his replying affidavit tea plantation licence in the name of Ngari Kagurukia. That licence shows that Ngari Kagurukia cultivated tea on the parcel of land known as L.R. no. Magutu/Gaikuyu/335. That land was subdivided into three portions pursuant to a court decree issued vide Nyeri S.R.M.C.C.C.NO. 275 OF 1989. It is not in dispute that Ngari Kagurukia was the father of Paul Muriuki Ngari and the husband to the respondent. The parcel of land known as L.R. no. Magutu/Gaikuyu/748 is a subdivision of L.R. no. Magutu/Gaikuyu/335. I expected the applicant to show this court some evidence to prove that she harvests and delivers tea to some factory so that I am satisfied that she cultivates tea on the land in dispute. She has failed to discharge that burden. She has therefore failed to establish a prima facie case with some probability of success. The applicant has alleged that the respondent has interfered with her peaceful occupation and use of part of the land. I am unable to agree with the applicant. She has specifically admitted that she occupies L.R. no. Magutu/Gaikuyu/748 and not L.R. no. Magutu/Gaikuyu/750. It is therefore obvious that she has also failed to prove that the respondent has interfered with her occupation and use of the land. Having failed to establish that she has a prima facie case with a probability of success, it is obvious that she cannot be expected to show that if she is denied the order of injunction she would suffer irreparably.

In the end, I see no merit in the summons. The same is dismissed with costs to the respondent.

Dated and delivered this 8<sup>th</sup> day of April 2011.

J.K. SERGON  
JUDGE

In open court in the presence of Mr. Wachira for Appellant and N/A Ndirangu for Respondent.

J.K. SERGON  
JUDGE