



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 93 OF 2011**

**PATRICK KARIMI WAIRAGU t/a THIGI GENERAL STORES.....  
....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....1<sup>ST</sup>  
DEFENDANT**

**JOSEPH G. MUTURI t/a MUGA AUCTIONEERS & GENERAL MERCHANTS.....2<sup>ND</sup>  
DEFENDANT**

**AND**

**MARTIN WAIRAGU KAARIMI (to be joined as the Administrator and legal representative of the  
Estate of ELIZABETH THIGI WANJAU (Deceased) .....1<sup>ST</sup> PROPOSED INTERESTED  
PARTY**

**DANIEL NDEGE NDIRANGU.....2<sup>ND</sup> PROPOSED INTERESTED  
PARTY**

**RULING**

The Notice of Motion dated 15/11/2011 was filed by Martin Wairagu Karimi and Daniel Ndege Ndirangu. The applicants seek to be joined to these proceedings as co-plaintiffs and also seek an order of injunction to restrain the defendants jointly and severally by themselves or their agents from advertising for sale or selling, alienating or disposing off the land known as Gituamba/Muhotetu Block 2/1094 and Nyahururu Municipality Block 6/458, pending the hearing of the suit.

The application is based on grounds found in the body of the application and the supporting affidavit sworn by Martin Wairagu, administrator of the estate of Elizabeth Thigi Wanjau, having obtained a limited grant (MWKI) dated 11/11/2011. He deposed that Daniel Ndege Ndirangu and the deceased own the two suit plots as evidenced by copies of certificates of official search (MWK2(a) and (b) and the plots are charged in favour of the 1<sup>st</sup> defendant; that the co-Interested Party, and the deceased guaranteed the plaintiff and the defendant wants to realize its security in the land yet the plaintiff has not defaulted and there are also issues pending in court between the plaintiff and defendant and the court has given interim orders stopping sale of the plaintiff's properties which were charged in favour of the 1<sup>st</sup> defendant; That the defendant has scheduled a sale of the property by public auction on 18/11/2011 (MWK5) and the Interested Parties contend that the move is capricious since the defendant has not exhausted the remedies it has against the plaintiff. That is why the Interested Parties seek to be joined to these proceedings as co-plaintiffs and that the properties should be preserved pending the hearing of the application coming up for hearing on 15/12/2011. Mr. Simiyu, counsel for the applicants argued that the Interested Parties have not

been party to the other issues already before the other courts and that they seek to preserve the estate of the deceased before letters of administration are confirmed. He urged the court to consider Section 1A & B of the Civil Procedure Act. Mr. Kadima appeared for the plaintiff and did not oppose the application.

The application was vehemently opposed and a replying affidavit was sworn by Ken Kiurah Omwega, on 16/11/2011 and Mr. Githiru appeared on the defendant's behalf. Mr. Githiru urged that the applicants are non-suited to bring this application to seek an order of injunction in respect of Plots, Nyahururu Municipality Block 6/468 and Gituamba/Muhotetu Block 2/1094 which are not supported by the plaint and the prayer is therefore hanging. It was also urged that the applicants have not disclosed material facts that the plaintiff, Charles Githinji Wairagu, an administrator of Elizathe Thingi Wairagu's estate filed a Chamber Summons dated 4/8/09 in NKU HCC 229/09 seeking orders of injunction in respect of Gituamba/Muhotetu Block 2/1443 and Gituamba/Muhotetu Block 2/1094; that the 2<sup>nd</sup> proposed Interested Party has not disclosed that on 12/8/09, he filed an application against the 1<sup>st</sup> defendant seeking an order of injunction in HCC 229/09, **Daniel Ndege V. Barclays Bank** in respect of Nyahururu Municipality Block 6/468 (pages 32) and 50 and that in a ruling delivered by J. Emukule on 22/7/2010, he dismissed both applications (PS 51-62). Further, that Charles Githinji also filed a Notice of Motion in Court of Appeal NKU CA 15/2010 seeking an order of injunction pending hearing of an intended appeal against the ruling of J. Imukule, the Court of Appeal declined to certify the application as urgent; lastly, Joseph Muya Kinyua sought an injunction in PMCC 306/2010 in which the applicant sought to have the 1<sup>st</sup> defendant restrained from the suit properties and the suit was struck out.

It is the respondent's contention that this application is an abuse of the court process and an attempt to obtain interim orders through the back door.

Having heard the rival arguments, this court is satisfied that the applicants are guilty of material non-disclosure. They failed to disclose that they have filed several applications in court in respect of the same subject matter all of which have been dismissed; I will list them down:-

- 1. In Nakuru HCC 323/06, Patrick Karimi Wairagu V Barclays Bank, where the applicant sought to restrain the plaintiff from selling or interfering in Nyahururu Municipality Block 6/468, Gituamba Muhotetu Block 2/1443, Nyahururu Municipality LR 46105 and several other plots. The plots subject to this application were included.**
- 2. Nyahururu PMCC 306/2010, Joseph Muya Kinyua V. Barclays Bank Ltd, in the chamber Summons the applicant sought to restrain the Bank from selling LR Nyahururu Municipality Block 6/468 and LR Gituamba Muhotetu Block 2/1094, one of the plots is the subject of this application. The application was dismissed.**
- 3. HCC 229/09, Charles Githinji V. Barclays Bank Ltd. The applicant sought orders of injunction to restrain the defendant from selling Gituamba Muhotetu Block 2/1443 and 2/1094, the same was dismissed.**
- 4. In the above suit Daniel Ndege Ndirangu filed a Chamber Summons on 12/8/09 seeking to restrain the defendants from selling the suit plots named in this application. Both applications were dismissed by J. Emukule on 22/7/2010.**
- 5. Charles Githinji then filed a Notice of Motion of appeal in CA 15/2010 to Court of Appeal against the ruling of J. Emukule and the court declined to certify it urgent.**

The filing of a multiplicity of applications respecting the same pieces of land and seeking the same orders before different courts is an abuse of the court process which this court frowns upon and in the result it cannot exercise its discretion to grant orders to one who has come to court with unclean hands.

In addition to the above, the defendants' counsel drew the court's attention to the fact that whereas Charles Githinji had been issued with limited grant of letters of administration way back on 30/7/2009, to institute proceedings in relation to the suit land herein, the 1<sup>st</sup> Applicant/Interested Party came to court

seeking a limited grant of letters of administration for purposes of defending this suit. I have seen the grant which indicates that the deceased died in 2011 yet the deceased died on 2/7/2001 as evidenced by the death certificate (P21). Again this is evidence that the applicants are ready to go to any extent to lie to the court in order to obtain orders. Their hands are tainted with falsehoods and that also amounts to an abuse of the court process.

The courts have considered the prayers for injunction in respect of the plots that are named in the application and have rejected the prayers for injunction. If they are dissatisfied they must await the outcome of the appeal in the Court of Appeal.

The applicants seek to be joined to these proceedings as Interested Parties. The land in issue in this application is not the same as that in the main suit. The best they would have done is, have the suits consolidated to be heard as one instead of having multiple files in different courts which may result in the court giving contradictory and embarrassing orders. I find that the application lacks merit, it is brought in bad faith and this court declines to exercise its discretion in the applicants' favour. The Notice of Motion dated 1/11/2011 is hereby dismissed with costs to the defendant/respondent.

**DATED and DELIVERED this 23<sup>rd</sup> day of November, 2011.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Simiyu for the applicant.

Mr. Githiru for the respondents.

Kennedy – Court Clerk.