



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC 119 OF 2010

IN THE MATTER OF CLAIM FOR TITLE TO LAND BY ADVERSE POSSESSION OVER
PORTION MEASURING 100 ACRES OUT OF L.R. NO. 4927

BETWEEN

AGNES WAITHERA MWANGI1ST PLAINTIFF
BEATRICE WACERA MWANGI2ND PLAINTIFF
CHARLES NJOROGE MWANGI3RD PLAINTIFF
RICHARD KIMARI MWANGI4TH PLAINTIFF
BERNARD MUTHOITA MWANGI5TH PLAINTIFF
CAROLINE NJERI MWANGI6TH PLAINTIFF
GEORGE KARIU MWANGI7TH PLAINTIFF
PAUL BOBO MWANGI8TH PLAINTIFF

AND

MIARAHO LIMITEDDEFENDANT

RULING

The Plaintiffs are daughters and sons of the deceased Mwangi Githinji who passed away on 7th October, 1991 at age 67. During his lifetime, the deceased Mwangi Kimanga (deceased) and Kanyi Gathuita (deceased) incorporated the Defendant company on 24th September, 1973. The Plaintiffs say that subsequent to that, on 17th May, 1974 the Defendant purchased all that parcel of land known as L.R. No. 4927 along Kamiti Road at Githurai in Nairobi measuring about 320 acres. The deceased and his family immediately occupied 100 acres in respect of which he had quiet, actual, open, physical and uninterrupted possession of the exclusion of everyone including the two directors, their beneficiaries, dependants, children, etc. The Plaintiffs were born between 1972 and 1982 and lived on the land with their parents. The Plaintiff has erected a four bedroom bungalow, the 2nd Plaintiff has constructed a club known as Brooklyne Club that can host about 1,000 patrons and a butchery, the Plaintiffs have jointly erected 8 permanent rental rooms, a permanent hotel, timber yard and offices. The 5th Plaintiff has allegedly built a club called Bets Pub that can take 200 patrons and the 3rd Plaintiff has a filling station. The Plaintiffs have other structures thereon; they carry an extensive farming and excavate building stones and murram on the land.

It is the Plaintiffs' case that they have since acquired the land by adverse and that they be registered as proprietors in place of the Defendant.

With the suit was filed an application under **sections 63 (c) and (e) and 3A of the Civil Procedure Act and Order 39 rules 1 (a) 2, 2A, 3 and 9 of the Civil Procedure Rules** for a temporary injunction to restrain the Defendant by itself, its authorised agent, servant, officers, employees or otherwise whatsoever

from interfering with the Plaintiffs' use, possession and in occupation of 100 acres or thereabout of L.R. No. 4927 until the suit is heard and finalized.

Stephen Main Kimanga is the chairman and one of the directors of the Defendant company. He swore a replying affidavit on behalf of the other directors to say that the Defendant is a limited liability company with four directors each with shares as follows:-

- a) Mwangi Kimanga 289,500 shares,
- b) Mwangi Githinji 60,000 shares,
- c) Gichuhi Macharia 50,000 shares, and
- d) Kanji Gathuita 52,500 shares.

When the company was incorporated, in 1973, he deponed, it acquired the suit property which was registered in its name. The suit property remained vacant until 1984 when Mwangi Githinji (the deceased), upon request, was allowed together with his family to stay on the suit land. Permission came from the other shareholders. The understanding was that, as shareholder, he was to take care of the suit property on behalf of the Defendant. He had two wives, Rose Nyambura Mwangi and Freshia Wanjiku. Rose Nyambura Mwangi knew that the deceased was being permitted to stay on the suit property. It was therefore deponed that the Applicant, as children of the deceased, were staying on the land by virtue of the shareholding of the deceased and cannot be heard to stake a claim on the land by adverse possession. He stated that recently, Rose Nyambura Mwangi moved to court seeking determination of her late husband's shareholding in the Defendant. The matter was referred to arbitration following which there was an award dated 24th June, 2009 which was adopted as the award of the court in HCCC. No. 716 of 2005 at Nairobi.

Further, the deponent stated that the Applicants had failed to disclose that there was a confirmed grant ("SK 2") in respect of the estate of the deceased. This is in HC Succession Cause No. 511 of 1992. The grant was to the two widows of the deceased, Freshia Wanjiku Mwangi and Rose Nyambura Mwangi. The grant has a schedule of property which includes the property in question. It was contended that, as a result, the Plaintiffs cannot claim the land by adverse possession. It was also pointed out the Plaintiffs mother, Nyambura, had gone to the High Court, in **HC. (Milimani) CC No. 276 of 2010**, seeking to stop the Annual General Meeting of the Defendant scheduled for 19th March, 2010 at Kenya Comfort Hotel. It is notable that stopping that Meeting was one of the prayers in this injunction application. That quest was dismissed by this court. Lastly, the deponent stated that the disputed land always had coffee plantations, and that most of the houses referred to by the Applicants belonged to the Defendant's members of staff.

This ruling is in respect of the injunction application. The court received written submissions from Mr. Kamwendwa and Mr. Njagi for the Plaintiffs and Mr. Omwangi for the Defendant. Both counsel made reference to several authorities. I have considered all these.

The principles governing the grant of *inter locutory* injunction have been settled since the decision in **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The Applicant has to demonstrate that he has a prima facie case with a probability of success; that he will suffer injury or loss which damages may not appropriately or adequately compensate if the application is not granted; and, if the court is in doubt, it will decide the application on the balance of convenience. Further an injunction is an equitable remedy. The Applicant is required to make the fullest possible disclosure of all the material facts within his knowledge. The court will look at the conduct of the Applicant to be sure that it meets the approval of the court of equity. (**Woodcraft Industries Limited and Others –Vs- The East African Building Society, HC (Milimani) CC No. 602 of 2000**).

It must be stated at the onset that the Plaintiffs are guilty of material non-disclosure. Following the death of their father, their mothers went to the succession court following which they have a confirmed grant in which the disputed property features. 10 acres from the disputed land is to be registered in the name of Freshia Wanjiku Mwangi to have a life interest after which one acre each would sue to Peter Maina Mwangi, Stephen Makenji Mwangi, John Kariu Mwangi, Erastus Muita Mwangi, Joseph Gature

Mwangi and Nahashon Mugambi Mwangi. The following three acres is to be decided into four parcels of 0.75 each to be given to Margaret Wangari Mwangi, Lucy Waithera Mwangi, Mary Njeri Mwangi and Florence Wachera Mwangi. The remainder of the deceased interest in the Defendant will be in the name of Rose Nyambura Mwangi to have a life interest and following her death to go to Lawrence Muthee Mwangi, Charles Njonge Mwangi (3rd Plaintiff), Richard Kimari Mwangi, (4th Plaintiff), Bernard Muthuita Mwangi (5th Plaintiff), George Kariu Mwangi (7th Plaintiff), Paul Boro Mwangi (8th Plaintiff), Agnes Waithera Mwangi (1st Plaintiff), Beatrice Wachera Mwangi (2nd Plaintiff) and Carolyne Njeri Mwangi (6th Plaintiff).

The other material evidence the Plaintiffs did not disclose was that their mother and the Defendant's shareholders had gone to arbitration in which she wanted determination of the deceased's shareholding in the Defendant company. The matter was heard by an arbitrator whose report was adopted by the High Court as shown above. It was decided that the land of the Defendant of which the 100 acres deemed a part should be subdivided to the shareholders in accordance with their shareholding. The arbitrator found that the deceased and her family were living on the disputed property with the permission of the other shareholders since 1984.

Lastly, it was not disclosed that when the Plaintiffs came to this court and filed this case and sought to stop the Annual General Meeting and to obtain an injunction, their mother was going to the High Court at Milimani with nearly the same prayers.

The Plaintiffs do not deserve the exercise of the discretion of the court in their favour because they hid this valuation information from the court. In any case, the High Court in **HCCC No. 716 of 2005** and the **Succession Court in HC Case No. 511 of 1992** are already seized of the matter regarding the shareholding of the deceased and his family in the Defendant company. It is clear that it has been decided that the 320 acres belonging to the Defendant be shared to the shareholders, who include the deceased and through whom the Plaintiffs claim, in accordance with the shareholding. The Succession Cause indicates how the Plaintiffs and the other beneficiaries will ultimately benefit once the deceased's shareholding, in terms of how many acres, is determined. It follows that both this application and the entire suit are an abuse of process of the court under **section 3A**.

The other issue is the Plaintiffs have come to the court seeking to assert their deceased's father's claim to the property which is presently in the name of the Defendant. Under **Order 23 of the Civil Procedure Rules** it is only their mother who can bring this suit as they are the holders of the grant to the estate. The Plaintiffs lack capacity to bring or maintain the suit. The same is therefore incompetent,

For the avoidance of doubt, the claim by the Plaintiffs that they have become entitled to the 100 acres by adverse possession is, in view of the evidence above, completely unsustainable.

In conclusion, the application and the entire suit are hereby struck out with costs.

**DATED AND DELIVERED AT NAIROBI
THIS 6TH DAY OF OCTOBER 2010**

**A. O. MUCHELULE
JUDGE**